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## Family Unity Revisited: Divorce, Separation, and Death in Immigration Law

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## Family Unity Revisited: Divorce, Separation, and Death in Immigration Law

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# FAMILY UNITY REVISITED: DIVORCE, SEPARATION, AND DEATH IN IMMIGRATION LAW

Albertina Antognini \*

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*Families are integral to immigration law and policy, and family-based immigration accounts for the majority of legal entry into the United States. Legislative, judicial, and scholarly discussions that address immigration law’s*

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\* Thomas C. Grey Fellow, Stanford Law School. I am grateful for the feedback of Kerry Abrams, David J. Barron, Heather Gerken, Andrew Gilden, Robert W. Gordon, Janet Halley, Clare Huntington, Sonia Katyal, Stephen Lee, Norman W. Spaulding, Jeannie C. Suk, Christopher Terranova, Andrew K. Woods, and participants at the Stanford Law School Fellows Workshop and the UC Irvine Immigration Law Scholars Conference. I have also benefited from countless conversations with Beth Colgan, Thea Johnson, Kaiponanea Matsumura, and Jeannie Merino. The Stanford Law Librarians provided excellent research assistance. Finally, I thank the editors of the *South Carolina Law Review* for their skillful edits and thoughtful comments.

*family-based categories rely nearly exclusively on the principle of family unification, which has long been a cornerstone policy of immigration law. Yet the family-based provisions of immigration law do more than unify intact families; understanding families as dynamic entities that experience change reveals an immigration system that acknowledges a flexible family structure in determining status.*

*The principal aim of this Article is to present a more complete description of the families that immigration law admits. To do so, it identifies moments where family relationships break apart—in the form of divorce, separation, and death—and considers how the immigration system navigates each instance in granting status. Engaging in this analysis has a number of implications. As a general matter, it provides a more accurate and comprehensive picture of the families that immigration law acknowledges in the first instance. In particular, it reveals that immigration law grants status in the context of a wide range of family relationships, including divorced couples, separated couples, and non-marital couples. It also identifies where the immigration provisions are at odds with their own asserted goal of promoting family unity—specifically by burdening the marital relationship.*

*Even more fundamentally, identifying the actual families that immigration law admits raises a series of questions as to why immigration law relies on families at all. Articulating these questions is the necessary first step in establishing some much needed conceptual clarity to the role that American families play in determining admission into the United States.*

## I. INTRODUCTION: FAMILY UNITY IN IMMIGRATION LAW

Families are central to American immigration law and policy. Family-based admissions constitute the majority of visas issued each year and family relationships are integral to immigration law design.<sup>1</sup> The most widespread understanding of the immigration regime's focus on families is that it fulfills the goal of family unification, which is considered "the cornerstone of the

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1. See Kerry Abrams, *What Makes the Family Special?*, 80 U. CHI. L. REV. 7, 7, n.1 (2013). More than eighty percent of immigration admissions are based on some form of family sponsorship. *Id.* (calculating the number of family-based visas issued in 2011, including derivative visas); see also U.S. DEP'T OF HOMELAND SECURITY, 2012 YEARBOOK OF IMMIGRATION STATISTICS tbl.7 (2013), available at [http://www.dhs.gov/sites/default/files/publications/ois\\_yb\\_2012.pdf](http://www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf) [hereinafter 2012 YEARBOOK OF IMMIGRATION STATISTICS] (including statistics that show that around sixty-six percent of immigrants were given permanent resident status on the grounds of a family-based or immediate relative category, without getting into the derivative beneficiaries of a family-based relationship); WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43145, U.S. FAMILY-BASED IMMIGRATION POLICY 1 (2013) (noting that "[f]amily based immigration currently makes up two-thirds of all legal permanent immigration").



immigration admission system.”<sup>2</sup> As such, Congressional debates about family-based categories center on questions of family unity;<sup>3</sup> courts and administrative agencies interpreting family-based provisions address whether family unification is promoted or prevented;<sup>4</sup> and scholarly discussions, even those critical in nature, generally question only whether unity is actually achieved, or how the current categories work to exclude certain types of families.<sup>5</sup>

This Article begins from the premise that the family unification principle—the notion that immigration law brings together intact families separated only by geography—does not fully capture the workings of the family-based categories of immigration law. It looks beyond family unity in order to engage in a more

2. *Role of Family-Based Immigration in the U.S. Immigration System: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int’l Law*, 100th Cong. 25 (2007) [hereinafter *Role of Family-Based Immigration*] (statement of Prof. Bill Ong Hing).

3. See, e.g., *The Uniting American Families Act: Addressing Inequality in Federal Immigration Law: Hearing Before the Comm. on the Judiciary U.S. S.*, 111th Cong. 1 (2009) (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary) (“The preservation of family unity is at the core of our immigration legal system, and this American value has to apply to all families.”).

4. See, e.g., *Bangura v. Hansen*, 434 F.3d 487, 499–500 (6th Cir. 2006) (quoting S. REP. NO. 80-748, at 13 (1965), reprinted in 1965 U.S.C.C.A.N. 3328, 3332.) (“The new [immigration] system aims to prevent family members from being separated. ‘Reunification of families is to be the foremost consideration.’”); *In re H-A-*, 22 I. & N. Dec. 728, 745 (B.I.A. 1999) (“The goals of promoting family unity and efficiently resolving cases through the adjustment of status mechanism is better served by providing a forum to consider an adjustment application submitted by a qualifying spouse who has demonstrated a prima facie showing of a bona fide marriage.”).

5. These pieces are essential contributions to the literature addressing the regulation of families by immigration law. See, e.g., Abrams, *supra* note 1, at 9 (proposing diverse rationales for why family-based immigration has been prioritized by the American immigration law system); Jessica Feinberg, *The Plus One Policy: An Autonomous Model of Family Reunification*, 11 NEV. L.J. 629, 630–31 (2011) (citing Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952)) (arguing for a “plus one policy” of family reunification to enable sponsors to elect to bring an individual to the United States that are not recognized by current immigration law categories); Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family that Protects Children’s Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509, 510 (2010) (arguing that U.S. immigration law should embrace a functional, rather than biological, account of the family in protecting the international human rights of children); Aubry Holland, Comment, *Toward A More Inclusive Vision of the Family*, 96 CALIF. L. REV. 1049, 1050 (2008) (arguing that immigration law should accommodate more non-traditional family models recognized by family law); Monique Lee Hawthorne, *Family Unity in Immigration Law: Broadening the Scope of “Family,”* 11 LEWIS & CLARK L. REV. 809, 811 (2007) (arguing that immigration law excludes families that are currently existing in the United States and is failing to achieve the goal of family unification); Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 WIS. L. REV. 345, 347 (2007) (identifying the ways, both historical and contemporary, that immigration laws regulated family intimacy with the effect of preventing family unity and preserving racial hierarchies); Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens’ Rights*, 41 VILL. L. REV. 725, 732 (1996) (arguing for a “constitutionally humane” approach in matters concerning immigration, particularly in order to protect the family who seeks unity as promised by the immigration laws).

complete, and a more accurate, assessment of the families that immigration law recognizes in granting status. Changing the unit of analysis to focus on the families being admitted, rather than on the reunification of those families, uncovers a range of family formations that immigration law routinely acknowledges in granting status, but that legal actors and scholars for the most part disregard.

To be clear, the principle of family unification has deep roots in immigration law. In 1965, the Immigration and Nationality Act, otherwise known as the Hart-Celler Act,<sup>6</sup> established the family unit as the central means of gaining entry into the United States—in so doing, it replaced national origins quotas with a system that relied heavily on family-based visa classifications.<sup>8</sup> Prior even to the Act's passage, family unity was prioritized by an immigration system that was otherwise exclusionary.<sup>9</sup> The Emergency Quota of 1921, for instance, was family inclusive as it was racially exclusive, permitting certain family members to enter the United States despite restricting admission on account of national origin.<sup>10</sup> Similarly, Supreme Court cases at the turn of the century upheld Congress's broad powers to exclude, while admitting immigrant families in the absence of explicit statutory directives.<sup>11</sup>

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6. Hart-Celler Act, Pub. L. No. 89-236, 79 Stat. 911 (1965). *See* H.R. REP. NO. 89-745, at 12 (1965) ("the bill has a revised order of preferences to first reunite families and next to admit those aliens, without family ties in the United States, who contribute to the national economy").

7. Hart-Celler Act, sec. 3, §§ 201(a)–(b), 203(a), 79 Stat. 911, 911–13.

8. *Id.* The emphasis on family unification took place within a larger scheme that was American-labor protective; the Hart-Celler Act changed the baseline from allowing skilled workers to immigrate unless the Secretary of Labor certified that there would be adverse effects on American labor, to excluding foreign workers unless the Secretary of Labor determined there would be no adverse effects on similarly employed American citizens. JOYCE VIALET, CONG. RESEARCH SERV., JV 6201, IMMIGRATION AND NATIONALITY LEGISLATION ENACTED 1962-1974 17 (1975) (discussing Section 212(a)(14)). Of course, labor-based and family-based immigration are not mutually exclusive. As Senator Reid explained in justifying family reunification: "if you have a member of the family who has a good job and a home here, it is a reasonably sure guarantee that another member of the same family coming in will be well taken care of and will be assured of a job." *Hearings on H.R. 2850 Before Subcomm. No. 1 of the Comm. of the Judiciary H.R.*, 89th Cong. 183 (1965) (statement of Sen. Ogden Reid).

9. *See, e.g.*, Emergency Quota Act, ch. 8, § 2(a), (d), 67th Cong. 5–6 (1921) (restricting "the number of aliens of any nationality" per year "to [three] per centum of the number of foreign-born persons of such nationality resident in the United States" in 1910 and providing that "preference shall be given so far as possible to the wives, parents, brothers, sisters, children under eighteen years of age, and fiancées" of U.S. citizens or certain aliens eligible for U.S. citizenship).

10. *See id.* This recognition of family members may not have necessarily been an expansion of family admission; as Kerry Abrams notes, prior to the Act, there had only been grounds of exclusion, rather than enumerated grounds for inclusion. *See* Abrams, *supra* note 1, at 13. Also, the preferred family was often "feminine" by definition—that is, in 1924 Congress exempted wives from the quotas set up in 1921, but only gave husbands of citizens a "preference" within the quotas. Immigration Act of 1924, Pub. L. No. 68-139, § 4(a), 43 Stat. 153, 155.

11. *See, e.g.*, *U.S. v. Gue Lim*, 176 U.S. 459, 468–69 (1900) (holding that the wife and three children of a merchant from China did not require a certificate for entry and only needed to prove

Debates leading up to the Hart-Celler Act did not, however, engage in any extensive discussion of which families would be unified; they only emphasized the need to unify families that were being separated by the immigration laws.<sup>12</sup> The way the family would be unified was straightforward: “The closer the family relationship the higher the preference.”<sup>13</sup> The Hart-Celler Act codified these determinations by prioritizing the nuclear family. It allowed “immediate relatives” entry without numerical limitation and defined them as “the children, spouses, and parents of a citizen [over twenty-one years of age] of the United States.”<sup>14</sup> The preference categories then began with unmarried sons and daughters of U.S. citizens, followed by the spouses and unmarried sons and daughters of legal permanent residents.<sup>15</sup> Third preference was given to members of professions recognized for their “exceptional ability.”<sup>16</sup> Married children of U.S. citizens were given fourth preference, followed by siblings of U.S. citizens over the age of twenty-one.<sup>17</sup>

The structure set forth by the Hart-Celler Act continues to define family admissions to this day.<sup>18</sup> Similarly, the principle of family unification continues to dominate discussions surrounding the family-based categories of immigration law.<sup>19</sup> Yet families are dynamic units that experience disruption and change.

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their ties to the husband and father, respectively). Compare Todd Stevens, *Tender Ties: Husbands' Rights and Racial Exclusion in Chinese Marriage Cases, 1882-1924*, 27 LAW & SOC. INQUIRY 271, 272 (2002) (analyzing the increase in admission of Chinese women immigrants to a Chinese immigrant population that was over ninety-five percent male in 1882), with Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 406-11 (2005) (citations omitted) (exploring the intersection between race, gender, and American citizenship and focusing on the negative impact of marriage on the citizenship of women who married Asian men).

12. The dilemma of separating a mother from her child was raised to communicate the plight of that family. *Immigration: Hearings Before Subcomm. No. 1 of the Comm. of the Judiciary H.R. on H.R. 2850*, 89th Cong. 8 (1965) (“Under present law, we are requiring the separation of families—indeed, in some cases, calling on mothers to choose between their children and America.”) (statement of Nicholas Katzenbach, Att’y Gen. of the United States).

13. S. REP. NO. 89-748, at 13 (1965).

14. Hart-Celler Act, Pub. L. No. 89-236, sec. 1, § 201(b), 79 Stat. 911, 911 (1965).

15. *Id.* sec. 3, § 203(a)(1)–(2), 79 Stat. at 912–13.

16. *Id.* sec. 3, § 203(a)(3), 79 Stat. at 913.

17. *Id.* sec. 3, § 203(a)(4)–(5), 79 Stat. at 913. The final categories are for skilled or unskilled laborers, refugees, and those not given preference in the prior sections. *Id.* sec. 3, § 203(a)(6)–(8), 79 Stat. at 913–14.

18. See 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a) (2012). In the course of the short-lived immigration reform discussions, there was a proposal raised to restrict the family-based preference categories and eliminate the U.S. citizen sibling preference category and introduce a merits-based point system in deciding to grant status. Border Security, Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (1st Sess. 2013).

19. See, e.g., Abrams, *supra* note 1, at 9–10 (discussing the importance of family unity in immigration law and subsequently analyzing other purposes served by the family-based provisions within a rubric that still considers only intact families).

And immigration law often recognizes these moments of rupture in granting status on the basis of family relationships.

In order to establish a more realistic picture of the families that immigration law regulates, this Article examines the ways that family relationships break apart. In particular, the Article considers how divorce, separation, and death between adults<sup>20</sup> figure into immigration law's "core" function of regulating admission into, and adjustment of status within, the United States.<sup>21</sup> This Article analyzes these ruptures at the moment where immigration law determines whether the individuals form a part of the family for purposes of admission.<sup>22</sup>

These immigration regulations fundamentally affect, and in turn shape, American families; to underscore this important point, the Article concentrates on family sponsorship claims made by U.S. citizens.<sup>23</sup> It addresses the immigration provisions that establish principal beneficiary status on the basis of the family relationship,<sup>24</sup> and examines rules outside of these specific categories

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20. Adult relationships experience more change by choice than do parental relationships. See *Immigration Marriage Fraud: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Comm. of the Judiciary S.*, 99th Cong. 2 (1985) ("[A]mong those relationships covered by family reunification, spouse is the one relationship that is largely self-created.") (statement of Sen. Alan K. Simpson). A concurrent project on which this author is working considers how immigration law navigates relationships between children and parents at the moment of deportation. While sometimes difficult to separate, each relationship is sufficiently important to merit independent consideration.

21. See *DeCanas v. Bica*, 424 U.S. 351, 355 (1976) (defining the "regulation of immigration" as "essentially a determination of who should or should not admitted into the country, and the conditions under which a legal entrant may remain"); Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 610 (2013) (identifying the "'core' immigration functions" as "admission and removal of noncitizens"). Family ties are also significant during the second "core" function of immigration law—deportation. See 8 U.S.C. § 1229b(b)(1) (2012). This topic is beyond the scope of this piece, but touches on this author's future article addressing families during removal proceedings.

22. Importantly, divorce, separation and death are events that occur internally to the family. In this sense they differ from the rupture caused externally by, for instance, the deportation of family members on account of different legal statuses, or the lengthy wait family members must undergo before living together in the same country. See Maria del Pilar Castillo, Comment, *Issues of Family Separation: An Argument for Moving Away From Enforcement Solutions to Our Immigration "Problem,"* 25 TEMP. INT'L COMP. L.J. 179, 180 (2011) (addressing the effects of deportations on family unity and arguing that immigration law should balance the right to exclude and the right to family unity); Evelyn H. Cruz, *Because You're Mine, I Walk the Line: The Trials and Tribulations of the Family Visa Program*, 38 FORDHAM URB. L.J. 155, 156–57, 177–81 (2010) (citations omitted) (identifying current backlog on family visas and decade-long wait times that have accumulated and offering proposals to reform the current system so as to better achieve the goal of family unification).

23. Although this Article addresses legal permanent residents where issues unique to their status arise.

24. As such, this Article primarily addresses principal beneficiaries rather than derivative beneficiaries. Family-based visas either directly admit spouses as principal beneficiaries of an immediate relative or family preference category, or allow for the spouses or children of immigrants admitted under other categories, such as employment or diversity to join as derivative beneficiaries.

only where they help canvass the ways immigration law interacts with different family formations.<sup>25</sup> Understanding the family as an entity that is broken apart, or in the process of breaking apart, reveals an immigration system that acknowledges this flexible family in granting legal status.<sup>26</sup> It also provides the necessary foundation for deepening the debate—missing during the passage of the Hart-Celler Act—addressing which families should gain admission, and why.

This Article proceeds in four parts. Part II shows how divorce, death, and separation, which the Article refers to as moments of “dis-unity,” are essential to describing the American family. The aim here is to illustrate how these moments are not events that simply occur to an otherwise intact family, but are central to shaping that very family. As such, any description of the American family that fails to consider these instances is fundamentally incomplete. This contention is supported not only by historical and sociological accounts of the family, but also by the body of law that deals most explicitly with families, that of family law. Furthermore, each type of dis-unity serves to highlight a different aspect of the family relationship. Divorce emphasizes how routinely moments of dis-unity affect families,<sup>27</sup> and in the process reshapes them. Separation, which can take place outside of a marital relationship, functions to signal the existence of adult relationships beyond marriage. Death provides an especially stark example of how moments of dis-unity do not necessarily terminate a

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If, for instance, the preference visa category allows married children of U.S. citizens to enter as principal beneficiaries, the married child’s spouse is also allowed entry as a derivative beneficiary. The same is true of an immigrant admitted through an employment-based category—if a worker comes into the United States on an employment-based visa, that worker can bring his or her spouse, and any children, as derivative beneficiaries. Despite this Article’s focus on the principal beneficiaries of family-based categories, it is nevertheless generally relevant to thinking about the role of family relationships in the context of the derivative categories.

25. This move is analogous to the move between what Janet Halley and Kerry Rittich consider to be “Family Law 2” and “Family Law 3” in a range that falls between one and four. See Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 761–62 (2010) (looking beyond “Family Law 1,” defined as “what you will find in a modern family law code” to “Family Law 2,” which is composed of “the explicit family-targeted provisions peppered throughout substantive legal regimes that seem to have no primary commitment to maintaining the distinctiveness of the family” and “Family Law 3” which addresses “the myriad legal regimes that contribute structurally but silently to the ways in which family life is lived and the household structured”).

26. Legal status comprises all types of recognized lawful status, including nonimmigrant status. A nonimmigrant includes anyone who is admitted to the United States for a specific purpose and for a temporary period of time; nonimmigrant status includes students, tourists, and exchange visitors. THOMAS ALEXANDER ALENIKOFF, ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 396–97 (6th ed. 2008).

27. See Elizabeth F. Emens, *Regulatory Fictions: On Marriage and Counter-marriage*, 99 CAL. L. REV. 235, 241 (2011). (citing Linda A. Jacobsen & Mark Mahar, *U.S. Economic and Social Trends Since 2000*, 65 POP. BULL. 10 (2011)). (“A core aspiration of marriage is that it last forever: *Till death do us part*. The reality is of course rather different, with divorce rates for first marriages at 45–50 percent in the United States.”).

relationship, or the larger family unit. In every instance, accounting for dis-unity within the family expands, rather than ends, the contours of that family.

Part III then turns to immigration law and identifies where it grants status in moments where the family relationship is no longer intact. This section focuses on how the immigration system navigates divorce, separation, and death when the relationship itself was the basis for granting status. In the process, this Part uncovers a set of circumstances where legislation, administrative decisions, and judicial opinions, account for and accommodate the dissolution of a relationship between spouses or non-marital partners. These moments range from explicit acknowledgment of dissolution as a feature of families to implicit acceptance by deciding to grant status in the context of a dissolving relationship. While such moments remain exceptions to the rules setting out admission overall, their presence is much stronger than any discussion considering immigration law currently admits.

Identifying the various family structures acknowledged by immigration law helps locate the limits of immigration law's acceptance of different family units. Most counterintuitive is the realization that the system's asserted purpose of facilitating the marital relationship is often frustrated—by rules that burden that relationship. Part IV first establishes where divorce, separation, and death terminate immigration status given that the rules recognize only a specific form of unity. Immigration law can be rather tolerant of dis-unity in the absence of a formal legal coupling. Part IV then considers where immigration law fails to grant status in cases where an intact family relation exists, or when some form of family unity defeats immigration status. Specifically, this section reveals where the decision to marry an American citizen may result in either the loss of immigration status or impact the family's ability to remain together in the United States.<sup>28</sup>

Finally, this Article attempts to answer the question of why complicating the families of immigration law matters. Part V outlines a series of implications that result from identifying this more complete taxonomy of families in the immigration system. Significantly, the description of immigration law's acceptance of dis-unity as an underappreciated feature of the system does not lead to any particular proposal for reform. Instead, understanding the families that immigration law admits helps to conceptualize and question some of the assumptions obscured by a strict reliance on family unity. For instance, immigration law is surprisingly receptive to flexible family structures in deciding

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28. See, e.g., 8 U.S.C. § 1151(b)(2)(A)(i) (2012) (considering petition based on the death of surviving spouse only until date of remarriage); see also Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 393 (2008) (contesting the distinction between the rules that concern selection and those that concern regulation, arguing that “[t]he process of selecting immigrants is deeply and irrevocably intertwined with the process of regulating their daily lives”).

who gains admission into the United States. It is also inconsistent, depending on which purpose it is considered to serve.<sup>29</sup>

Indeed, identifying the presence of divorce, separation, and death leads to a series of more searching questions about the overarching purpose and design of the immigration system. If family unification does not, on its own, provide a comprehensive explanation for the existence of the family-based categories of immigration law, then what does? Scholars have begun to propose different goals that family unification may serve—among them to facilitate integration; ensure that the immigrant does not become a public charge; reflect a belief that as Americans, we value nuclear families.<sup>30</sup> Yet these discussions have largely overlooked the different types of families routinely allowed entry. If, for example, an immigrant can adjust legal status on the basis of a marriage post-divorce, then what purpose can family unity be said to promote? Such an understanding is essential to any relevant debate about the current system, or to any germane proposal for reform.

Ultimately, considering families to be something other than strictly unified entities provides a measure of much needed conceptual clarity to Congress's use of the family unit in regulating entry into the United States. It also helps flesh out the contours of the family that immigration law currently acknowledges, which includes divorced couples, separated couples, and cohabiting couples.

## II. THE AMERICAN FAMILY

“The American family has never been static.”<sup>31</sup> The story of the family is not only one of unity and continuity, but also one of dis-unity and change. This is true of the shape of American families as it is of the shape of American family law.<sup>32</sup> As a purely descriptive matter, a complete account of families must address moments of rupture. Divorce, death, and separation are not events that simply affect adult relationships—they are central to defining those relationships.

This section provides an overview of divorce, death, and separation as moments that constitute the family unit. It also identifies how family law has accommodated and recognized these various moments of dis-unity within the

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29. See discussion *infra* Part V.

30. See, e.g., Abrams, *supra* note 1, at 7–8 (identifying justifications beyond human rights-based principles).

31. Jay D. Teachman, Lucky M. Tedrow, & Kyle D. Crowder, *The Changing Demography of America's Families*, 62 J. MARRIAGE & FAM. 1234, 1234 (2000).

32. See Martha Minow, 'Forming Underneath Everything That Grows: Toward a History of Family Law', 1985 WIS. L. REV. 819, 819–26 (1985) (citations omitted) (challenging the dominant account of family law set forth in codes, textbooks, treatises, by looking “beneath the traditional view of history of family law”).

family. My goal here is not to present a comprehensive history of each type of dis-unity, but rather to illustrate how each dis-unity exists within the family unit.

Understanding that moments of rupture form a part of the family expands the contours of the family both factually and conceptually. Divorce, for instance, does not necessarily terminate the relationship between the two parties to the marriage, or between other family members; instead, it reshapes those relationships.<sup>33</sup> The availability of divorce also provides a platform for entering into other family units, as divorce is followed often by remarriage.<sup>34</sup> Identifying dis-unity as a feature of families may have the further effect of strengthening the unity that exists in its absence<sup>35</sup>—the family that remains together does so not because it must, but because it chooses to.<sup>36</sup> Finally, directly addressing family dis-unity leads to different forms of unity,<sup>37</sup> separation, for instance, exists in the context of the initial relationship, which may be non-marital. In this manner, considering dis-unity points to the existence of relationships beyond marriage, including cohabitation.

#### A. Divorce

Unity and dis-unity, marriage and divorce, have long coexisted.<sup>38</sup> Unity has, in fact, taken shape in the shadow of an ever-growing dis-unity.<sup>39</sup> Sociological

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33. See ANDREW J. CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* 84 (Harvard Univ. Press 1981) (“When at least one spouse has children from a previous marriage, the family of remarriage can extend far beyond the bounds of the family of first marriage. Stepparents, stepchildren, stepsiblings, stepgrandparents, the new spouses of noncustodial parents, and other kin all may play a role in family life.”).

34. *Id.* (“[M]ost divorced persons remarry—about three-fourths of all women and an even larger proportion of all men.”).

35. Unity is often strengthened as a desirable objective in the context of a present state of dis-unity. See Laura J. Miller, *Family Togetherness and the Suburban Ideal*, 10 SOC. F. 393, 402 (1995). (noting that even while “family togetherness” has decreased given “the breakups and pathologies that strike so many families . . . there is still a strong sense that the sentiment behind [togetherness] is a noble goal.”).

36. See Andrew J. Cherlin, *American Marriage in the Early Twenty-First Century*, 15 THE FUTURE OF CHILDREN 33, 41 (2005). (“[M]arriage now exists in a very different context than it did in the past. Today it is but one among many options available to adults choosing how to shape their personal lives. . . . But if marriage is not optional, . . . its symbolic importance has remained high and may even have increased.”).

37. This Article uses the concept of unity outside of marriage broadly to include civil unions, domestic partnerships, and cohabitation, between same-sex and opposite-sex couples. While some states reserve civil unions for same-sex couples, there are several that include opposite-sex couples. See *Civil Unions & Domestic Partnership Statutes*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> (last updated March 26, 2014).

38. See Karl N. Llewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1281, 1281 (1932) [hereinafter Llewellyn, *Behind the Law of Divorce: I*] (“Divorce presupposes marriage. Without marriage it lacks all meaning. From marriage it takes origin, form, effect.”).



assessments of the American family in 1859 already described a rather alarming state of affairs: “The family, in its old sense, is disappearing from our land, and not only our free institutions are threatened, but the very existence of our society is endangered.”<sup>40</sup> By 1928, “the family [was] . . . undergoing a process of disorganization,”<sup>41</sup> which consisted of a “lack of unity within the home” as “divorce continue[d] to increase” and “domestic co-operation [was] less effective.”<sup>42</sup> No matter the era, public lamentations of a present state of disorganization and disruption, appealed to the existence of a steady, unified state that the family used to once possess.<sup>43</sup>

As scholarly discussions bemoaned the disappearance of “the family,” they nevertheless simultaneously described a new shape it was assuming—the disorganization was “possibly [a] reorganization.”<sup>44</sup> In so doing, they placed dis-unity squarely within the family, not outside of it: “Stable families are not necessarily those that remain together.”<sup>45</sup> While unity was either an ambition of the future or an ideal of the past, re-definitions of the contemporary family included dis-unity in the form of disruption and disorganization: the American family was “subject to infinite gradations in these criteria of family unity.”<sup>46</sup>

The institution of marriage specifically assumed diverse shapes that accommodated the presence of dis-unity in the form of divorce.<sup>47</sup> Laws regulating marriage began to accept the reality of divorce—“there is nothing radical or shocking in the proposal that free consent divorce be recognized

39. Or, as Karl Llewellyn put it, “[e]ach generation, as it bemoans the decay of the American home and morals in its own day, continues to find the wedlock of its fathers quite in order.” Karl Llewellyn, *Behind the Law of Divorce: II*, 33 COLUM. L. REV. 249, 265 (1933) [hereinafter Llewellyn, *Behind the Law of Divorce: II*].

40. Herman Lantz, Martin Schultz & Mary O’Hara, *The Changing American Family from the Preindustrial to the Industrial Period: A Final Report*, 42 AM. SOC. REV. 406, 413 (1977) (quoting BOSTON Q. REV., 492, October 1859) (internal quotation marks omitted) (noting the public recognition of marital conflict began in the 1850s).

41. L.L. Bernard, *The Family in Modern Life*, 38 INT’L J. LEGAL ETHICS 427, 427 (1928).

42. *Id.* at 432.

43. See, e.g., James W. Carroll, *The Inevitability of the Nuclear Family*, 1 HUMBOLDT J. SOC. REL. 60, 60, 65 (1973) (emphasizing that “the nuclear family is inevitable” in the face of an increase in divorce rates and “more non-family persons, more spinsters and bachelors and deviants”); see also STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 1–7 (1992) (arguing that memories of traditional family life are myths, and that families “have never lived up to nostalgic notions about ‘the way things used to be’”).

44. Bernard, *supra* note 41, at 427.

45. Ray H. Abrams, *The Concept of Family Stability*, 272 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 7 (1950).

46. *Id.* (citing MABEL A. ELLIOTT & FRANCIS E. MERRILL, *SOCIAL DISORGANIZATION* 597–98 (rev. ed. 1941)).

47. See Llewellyn, *Behind the Law of Divorce: II*, *supra* note 39, at 259. The true challenge according to Llewellyn was not a reversal, but rather “the salvaging of such of the old values as are salvageable, and the building of them into new marriage institutions which can stand up under the new conditions.” *Id.*

officially, because free consent divorce exists in the United States as a fact.”<sup>48</sup> Moreover, divorce “did not signal the impending destruction of the family,”<sup>49</sup> but instead was understood to “constitute[] . . . a modification of the conjugal family system.”<sup>50</sup>

Today, there is little doubt that “[d]ivorce has become an intrinsic part of the family system.”<sup>51</sup> It exists within the family, as it “transforms, rather than ends, family relationships.”<sup>52</sup> Leaving aside the precise relationship between cause and effect,<sup>53</sup> family law has come to recognize divorce as routine, capturing as a matter of law the reality of families seeking dis-unity.<sup>54</sup> Even as divorce may continue to be normatively contested,<sup>55</sup> it is anything but novel,<sup>56</sup> or exceptional.<sup>57</sup>

This is not to say that family law’s recognition of divorce was easy; it was not, and at the beginning divorce was only granted upon proof of fault. Prior to the 1960s, state laws required allegations of wrongdoing in order to recognize any request to divorce.<sup>58</sup> Even if husband and wife agreed, they had to engage in

48. Llewellyn, *Behind the Law of Divorce: II*, *supra* note 39, at 284–85.

49. WILLIAM L. O’NEILL, *DIVORCE IN THE PROGRESSIVE ERA* 31 (Yale Univ. Press 1967).

50. *Id.* (“The divorce rate notwithstanding, it seems apparent that during the very years when the family was thought to be disintegrating it was in reality gaining in stability, cohesion, and before long, in popularity.”).

51. Frank F. Furstenburg, Jr., *Divorce and the American Family*, 16 ANN. REV. SOC. 379, 381 (1990).

52. John Lande & Forrest S. Mosten, *Family Lawyering: Past, Present, and Future*, 51 FAM. CT. REV. 20, 24 (2013).

53. While the exact relationship between the changing forms of marriage and the accessibility of divorce has been extensively debated, it has led to inconclusive results. *See* JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 180 (2011) (noting that the evidence is “skimpy and conflicting” and relying on the reality of separating families given that “[m]arital failure and family breakup breed divorce, not vice versa”); Stéphane Mechoulan, *Divorce Laws and the Structure of the American Family*, 35 J. LEGAL STUD. 143, 145–46 (2006) (identifying the body of literature seeking to explain the relationship between divorce laws, in particular the move from fault to no-fault, with the rates of divorce).

54. *See* Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1, 3 (2000) (“One can see that in all the states, the divorce rate began climbing long before no-fault divorce was adopted, and that no durable acceleration in the rate of increase followed its adoption.”).

55. *See, e.g.*, Robert M. Gordon, Note, *The Limits of Limits on Divorce*, 107 YALE L.J. 1435, 1435 (1998) (discussing the move by a few states in the 1990s to remove no-fault divorce laws and instill the more restrictive form of “covenant” marriage and arguing that highly restrictive divorce laws would have little effect on rates of divorce but would be harmful for children).

56. *See* Keith R. Bradley, *Dislocation in the Roman Family*, 14 HIST. REFLECTIONS/RÉFLEXIONS HISTORIQUES 33, 33–34 (1987) (asserting that marriage was not necessarily binding in Roman upper-class families and that divorce and remarriage were common).

57. *See, e.g.*, JAMES DWYER, *FAMILY LAW: THEORETICAL, COMPARATIVE, AND SOCIAL SCIENCE PERSPECTIVES* 679 (Wolters Kluwer Law & Business 2012) (“Divorce is the largest component of family law practice and involves many highly contested legal issues.”).

58. *See* GROSSMAN & FRIEDMAN, *supra* note 53, at 165.

a theater of accusations, based on fabricated claims of, for example, cruelty—“‘cruel’ spouses . . . usually struck their wives in the face exactly twice”<sup>59</sup>—or adultery—“lawyers would arrange for the wife, a private investigator, and a process server in a motel room with a scantily clad woman.”<sup>60</sup> By 1950, some states were beginning to recognize divorce without fault after a period of separation.<sup>61</sup> Less than two decades later, California became the first state to eliminate the requirement of fault-based grounds, permitting divorce on the basis of “irreconcilable differences.”<sup>62</sup> In the following years, the no-fault revolution took hold as the majority of states changed their laws.<sup>63</sup> No-fault, unilateral divorce was soon available in the majority of states.<sup>64</sup>

Obtaining a divorce does not necessarily end the family relationship as a legal matter, a factual matter, or both. If the couple had children, there may be custody arrangements that sustain a legal and a real relationship with the children, which may also have the effect of sustaining the relationship between the ex-spouses.<sup>65</sup> In the absence of children, a legal relationship between the ex-spouses can be maintained through an award of alimony.<sup>66</sup> There may also be an ongoing actual relationship between the couple, by choice or obligation.<sup>67</sup>

59. *Id.* (quoting MAXINE B. VIRTUE, *Family Cases in Court* 90–91 (1956)).

60. Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 639–50 (2013) [hereinafter Huntington, *Staging the Family*] (citing J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 89 (1997)) (analyzing the performative aspects of family law and proposing an alternative framework to denaturalize its more troubling effects).

61. GROSSMAN & FRIEDMAN, *supra* note 53, at 172 (citing DIFONZO, *supra* note 60, at 75–81). The Hart-Celler Act was passed fifteen years later. Hart-Celler Act, Pub. L. No. 89-236, 79 Stat. 911 (1965).

62. 1969 CAL. STAT. 332; GROSSMAN & FRIEDMAN, *supra* note 53, at 176 (noting that “California enacted the first so-called no-fault statute”).

63. *See* GROSSMAN & FRIEDMAN, *supra* note 53, at 176–80 (citations omitted) (outlining the rapid shift in states from fault to no-fault divorce).

64. New York was the exception until 2010, when it joined other states in recognizing no-fault divorce. *See* Lauren Guidice, Notes & Comments, *New York and Divorce: Finding Fault in a No Fault System*, 19 J.L. & POL’Y 787, 793–800 (2011) (citations omitted) (describing the emergence of no-fault grounds and New York’s delay in accepting irretrievable breakdown as a basis for divorce).

65. Many state legislatures have a presumption of joint legal custody of children. *See, e.g.*, CAL. FAM. CODE § 3080 (West 2004); *see also* CHERLIN, *supra* note 33, at 85 (“In postdivorce families, the children from previous marriages create links between households because of their visits with the noncustodial parent—visits that frequently require communication among the divorced parents, the new stepparent, and the noncustodial parent’s new spouse.”).

66. While alimony has been on the decline since the 1960s, it is still awarded by numerous states. *See* 24A AM. JUR. 2D *Divorce and Separation* § 662 (2008) (citations omitted) (defining alimony and indicating its continued presence in divorce proceedings). It has also been criticized for reinstating gender stereotypes and reinforcing the image of the “financially needy and deserving wife” upon divorce. Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1117 (1989).

67. *See* CHERLIN, *supra* note 33, at 85.

Beyond the partners themselves, each may continue to interact with the siblings and parents of their ex-spouses.<sup>68</sup> The family persists, in a variety of forms.

The aim of this section is not to present a narrative of progress or regress. Nor is it to argue that family law has transitioned from a status-based to a contract-based status quo.<sup>69</sup> Rather, this section makes the modest and mostly descriptive point that both families and family law have accommodated divorce by choice. Even if fault-based rules continue to cast a shadow on the availability of divorce in practice, family law accommodates this form of family dis-unity routinely. As such, family law allows adults to enter and exit various couplings—in more ways than one then, divorce cannot be separated from marriage.<sup>70</sup>

### B. Separation

In unions that are not marital, the couple can still experience rupture, in the form of a separation.<sup>71</sup> The separation of a cohabiting couple was, in fact, the event that precipitated the legal recognition of the underlying union. The first case to acknowledge the reality of couples living together outside of marriage was *Marvin v. Marvin*<sup>72</sup> in 1976; it addressed some of the relationship's legal consequences in the context of a separation.<sup>73</sup> The Supreme Court of California began its opinion discussing the enforceability of an oral contract after a non-marital relationship's dissolution in *Marvin* by confirming the reality of cohabitation—it opened with the fact that “there has been a substantial increase in the number of couples living together without marrying.”<sup>74</sup> It continued by

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68. See *id.* at 85, 87 (“after divorce, mother, father, and children all may have a different conception of who is in their immediate family”).

69. See Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 834–41 (2004) (warning against the family law canon's overstatement of change over time, which includes the move away from relationships based on status to relations based on individualism and contractual relations).

70. A week after the Supreme Court's decision in *United States v. Windsor*, newspapers began to publish op-eds questioning not what the ruling would mean for same-sex marriages, but what it would mean for same-sex divorces. See Erica Goode, *Ruling on Same-Sex Marriage May Help Resolve Status of Divorce*, N.Y. TIMES July 3, 2013, at A19 (quoting a family lawyer and gay rights advocate: “If you're going to let people into a relationship, you've got to let them get out.”); Margaret Klaw, Op-ed, *The Next Frontier: Gay Divorce*, WASH. POST, July 5, 2013, at A19 (“It seems inevitable that the Supreme Court will eventually find it unconstitutional for states to prohibit same-sex marriage . . . . Likewise, the very tangible benefits of divorce—the right to remarry, the right to divide property, the right to receive support—will be available to all couples.”).

71. A marriage can also go through a separation, but the focus of this section is on the effect of this dis-unity as the only form of dis-unity that a non-marital relationship can experience.

72. 557 P.2d 106 (Cal. 1976) (en banc).

73. *Id.* at 110.

74. *Id.* at 109.

noting that these relationships “lead to legal controversy when one partner dies or the couple separates.”<sup>75</sup>

Non-marital couplings are often legally recognized for the first time in moments of rupture, given that courts address cohabitation in the context of claims based on separation<sup>76</sup> or death.<sup>77</sup> In *Marvin*, the fact of separation paved the way for courts to acknowledge a new type of relationship.<sup>78</sup> Indeed, cohabiting couples have mostly gained legal rights implicitly from courts rather than explicitly from legislatures.<sup>79</sup> While some states offer cohabiting couples domestic partnerships or civil unions,<sup>80</sup> the availability of these legal statuses varies, and not all states legislatively grant them.<sup>81</sup> Nor do all couples

75. *Id.* at 122. The court held that an oral contract between non-marital partners was enforceable, reasoning in part that “the prevalence of non[-]marital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case.” *Id.*

76. *See, e.g., Klein v. Bratt*, No. FSTCV055000502S, 2009 WL 5184192, at \*1 (Conn. Super. Ct. Nov. 25, 2009) (addressing “a multi-count cause of action between two cohabiting adults who have terminated their romantic relationship” and noting that parties “join a line of litigants who have filed multiple lawsuits in an attempt to resolve their financial differences as cohabitators”).

77. *See, e.g., In re Estate of Roccamonte*, 174 N.J. 381, 392–93 (2002) (holding that surviving unmarried cohabitant was entitled to implicit promise of palimony given that “unmarried persons may, legitimately and enforceably, rest upon a promise by one to support the other” and that “each couple defines its way of life and each partner’s expected contribution to it in its own way”).

78. Courts have also recognized cohabiting couples in the face of third party suits. *See, e.g., Lozoya v. Sanchez*, 66 P.3d 948, 957–58 (N.M. 2003) (upholding a loss of consortium claim in the context of a cohabiting couple where there was a close familial relationship), *abrogated on other grounds by Heath v. La Mariana Apartments*, 180 P.3d 664 (N.M. 2008). And in the context of deciding whether to terminate alimony where a partner is cohabiting with another. *See, e.g., Gayet v. Gayet*, 92 N.J. 149, 153–54 (1983) (holding that cohabitation after divorce may end alimony payments and identifying other states that consider non-marital cohabitation in determining whether to end alimony).

79. *See Margaret M. Mahoney, Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 159–60 (2005) (citing *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976)) (describing the shift away from the “negative status” conferred by statutes that criminalized cohabitation but noting that the majority of states still do not consider cohabitation as a legally significant family status, with the exception of some states that recognize domestic partnerships). A few states have laws that recognize cohabiting couples, including domestic partnership laws or civil unions. *See Civil Unions & Domestic Partnership Statutes*, *supra* note 37 (listing thirteen states that have recognize civil unions or domestic partnerships).

80. Cohabiting couples include both same-sex and opposite-sex couples. For same-sex couples, however, a domestic partnership may be the only choice provided. And some states, like California, restrict opposite-sex domestic partnerships to couples where one individual is over sixty-two years old. CAL. FAM. CODE § 297 (West 2004). It remains unclear how the recent decision in *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), will impact domestic partnerships and civil unions.

81. *See Erez Aloni, Registering Relationships*, 87 TUL. L. REV. 573, 586–94 (2013) (outlining the legal schemes available to unmarried couples and arguing that domestic partnerships and civil unions are inadequate mechanisms for addressing cohabiting couples either because they are attempting to replace marriage for same-sex couples or contain prerequisites that are not applied to the decision to marry).

affirmatively want them.<sup>82</sup> The law surrounding cohabiting couples is mostly reactive, but there is little doubt that cohabiting couples may seek legal rights and remedies without being, or intending to be, married.<sup>83</sup>

As with divorce, family law is again confronting an already-established phenomenon—an increase in couplings outside of marriage.<sup>84</sup> While the existence of unmarried couples is decidedly not a new occurrence, cohabitation is understood as a specifically modern one.<sup>85</sup> In fact, it is hailed as emblematic of modern living. Sociologists have identified cohabitation as the principal indicator of “how family life in the United States is being transformed . . . with legal marriage losing its primacy as the manifest center of family ties.”<sup>86</sup> Summarizing the steady rise in cohabitation alongside the decline of marriage, the Pew Research Center’s Nationwide Survey in 2010 defined the family’s new configuration: “as marriage shrinks, family—in all its emerging varieties—remains resilient.”<sup>87</sup> Allowing the family to encompass different types of disunity enables the family to encompass various forms of unity.<sup>88</sup>

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82. For instance, “a couple’s decision not to marry” may “express[] the preference of one or both partners to be free of state regulation.” Mahoney, *supra* note 79, at 204.

83. See Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 1011–12 (2000) [hereinafter Dubler, *Wifely Behavior*] (“Today, while only eleven states and the District of Columbia recognize common law marriage, marriage no longer occupies the entire field of legally cognizable domestic relations. . . . In our contemporary legal regime, [] unlike one hundred years ago, couples may seek judicial enforcement of their rights and obligations without claiming that they ever intended to marry.”).

84. The relationship between cohabitation and marriage is a complicated one – for some couples, cohabitation may be a replacement of marriage while for others it may be a precursor – “cohabitation may represent all of these for different couples and at different points in the life course.” In any case, “the data suggest . . . that cohabitation is not going away, and will most likely become a more prominent feature of family patterns.” Pamela J. Smock & Wendy D. Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 LAW & POL’Y 87, 108 (2004) (citing LYNNE M. CASPER & SUZANNE M. BIANCHI, CONTINUITY AND CHANGE IN THE AMERICAN FAMILY (2002); Wendy D. Manning & Pamela J. Smock, *First Comes Cohabitation and Then Comes Marriage?*, 23 J. FAM. ISSUES 1065 (2002); Patrick Heuveline & Jeffrey Timberlake, *Cohabitation and Family Formation Across Western Nations* (May 1–3, 2003) (paper presented at the Annual Meeting of the Population Assoc. of Am.)).

85. See Dubler, *Wifely Behavior*, *supra* note 83, at 960–62 (challenging the notion that non-marital cohabitation is a recent phenomenon and identifying the existence of non-marital relationships recognized through various legal doctrines as central to the definition of marriage).

86. Pamela J. Smock, *Cohabitation in the United States: An Appraisal of Research Themes, Findings, and Implications*, 26 ANN. REV. SOC. 1, 16 (2000).

87. Pew Research, Social & Demographic Trends, *The Decline of Marriage and Rise of New Families* (Nov. 18, 2010), <http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/>.

88. See generally Clare Huntington, *Postmarital Family Law*, 67 STAN. L. REV. (forthcoming 2015) [hereinafter Huntington, *Postmarital Family Law*] (identifying the decrease in marriage and the increase in nonmarital couples, proposing various amendments to family law so that it can better address the new “postmarital” reality, focusing on rules that govern how parents relate with their children). Huntington’s piece actually begins from the statistical reality that most cohabiting

Family law recognizes cohabitation and separation in addition to marriage and divorce in determining the legal rights of consenting adult couples.<sup>89</sup> But, the legal recognition given to dis-unity depends on the legal recognition initially given to the unified relationship. That is, where a relationship in its unified form receives explicit and uniform legal recognition, as does marriage for heterosexual couples, then the resulting dis-unity, divorce, is rather easily granted. Where the legal recognition of the relationship is weaker, or non-existent, choosing to end the relationship may become more complicated. For instance, civil unions can be difficult to dissolve given that they are not recognized by all states.<sup>90</sup> Same-sex divorce is similarly complicated, in light of the state-by-state nature of same-sex marriage.<sup>91</sup> This difficulty also exists in the context of opposite-sex couples that enter domestic partnerships and civil unions, but subsequently seek to separate.<sup>92</sup> The relationship between the legal recognition of unity and dis-unity is distinctly one of dependence. This dependence reveals that family law has not fully grappled with the different types of dis-unity, and possible unity, that take place within the American family.<sup>93</sup>

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couples separate, in order to call for a more robust and direct recognition of non-marital families by family law.

89. See, e.g., PRINCIPLES OF FAMILY LAW DISSOLUTION § 6.02 cmt. a (2002) (noting that most states “allow their courts to provide remedies when a domestic relationship dissolves, whether or not it has been created pursuant to an explicit agreement”).

90. See, e.g., *B.S. v. F.B.*, 883 N.Y.S.2d 458, 466–67 (N.Y. Sup. 2009) (declining to grant a dissolution in New York for a civil union entered into in Vermont). Civil unions can, however, be dissolved rather easily in the state in which the civil union was granted. Illinois, for instance, models the dissolution of a civil union on the dissolution of marriage. 750 ILL. COMP. STAT. 74/45 (2011); see Alan J. Toback, *Developing Issues in Family Law and Strategies For Facing Them*, in STRATEGIES FOR FAMILY LAW IN ILLINOIS (Nov. 2012), available at 2012 WL 49799560, at \*1, \*5 (noting that same rules apply to a couple who wishes to divorce as to a couple who wishes to dissolve a civil union in Illinois).

91. The right to divorce in the context of same-sex couples has been difficult, given the fact that many states do not recognize the marriage to begin with. See Judith M. Stinson, *The Right to (Same-Sex) Divorce*, 62 CASE W. RES. L. REV. 447, 449 (identifying the ways same-sex couples are denied the ability to divorce given that states that do not recognize same-sex marriage do not allow divorces and states that do may have limitations based on domicile); see also Goode, *supra* note 70 (discussing how if same-sex couples are permitted to marry, they must be permitted to divorce as well); Klaw, *supra* note 70 (noting that once same-sex marriage is universally permitted, the benefits that accompany it, including divorce, will follow). This may be, however, subject to change now that DOMA has been repealed.

92. Nancy Polikoff discusses the law’s shortcomings in dealing with the end of same-sex and opposite-sex relationships. See Nancy D. Polikoff, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 175–77 (2008) (“Unfortunately, *Marvin v. Marvin* proved to be an end point, rather than the beginning of a more appropriate legal treatment of all families.”).

93. The American Law Institute has suggested introducing rules regulating the dissolution of relationships between unmarried partners, to ensure the “just resolution of the economic claims of parties who qualify as . . . domestic partners.” See PRINCIPLES OF FAMILY LAW DISSOLUTION, *supra* note 89 (“A complete treatment of family dissolution cannot limit itself to relationships

At the very least what is clear today is that a single family unit may assume a variety of different forms—“divorce, remarriage, cohabitation, and life expectancy have led to the creation of complex family structures in the United States.”<sup>94</sup> While family law is still centered on marriage and divorce,<sup>95</sup> it has nevertheless been increasingly receptive to the reality of a family that changes, acknowledging the flexibility of contemporary families by accounting for divorce and separation, marriage and cohabitation.

### C. Death

The final form of dis-unity that shapes relationships is death.<sup>96</sup> Death, unlike divorce, exists as a matter of fact with subsequent repercussions as a matter of law.<sup>97</sup> In the legal arena, death is not traditionally considered a part of family law, but is cordoned off into trusts and estates.<sup>98</sup> The legal system therefore recognizes death principally in the form of property—as the distribution of property among those who survive the decedent.<sup>99</sup>

Laws surrounding death, like those surrounding separation, are contingent on the relationship that existed during life: marital and non-marital relationships have similar legal valences in life as they do after death.<sup>100</sup> If anything, death

entered according to the procedures and ceremonies required to create a lawful marriage . . . This Chapter is premised on the familiar principle that legal rights and obligations may arise from the conduct of parties with respect to one another, even though they have created no formal document or agreement setting forth such an undertaking.”). It has not, however, gained much traction.

94. Maria Schmeeckle, Roseann Giarusso, Du Feng, & Vern L. Bengtson, *What Makes Someone Family? Adult Children’s Perceptions of Current and Former Stepparents*, 68 J. MARRIAGE & FAM. 595, 595 (2006) (citing Matilda White Riley & John W. Riley, Jr., *Connections: Kin and Cohort*, in *THE CHANGING CONTRACT ACROSS GENERATIONS* 169 (Vern L. Bengtson & Andrew Achenbaum eds., 1993)).

95. See Huntington, *Postmarital Family Law*, *supra* note 88 (manuscript at 4–5) (“Family law places marriage at the very foundation of legal regulation. . . . Legal institutions created to oversee the family, particularly upon divorce, are designed for married families who have been formally recognized by the state.”).

96. See Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1230 (2005) (“[T]here are two ways to end a marriage: divorce or death.”).

97. Divorce, on the other hand, is only possible where there has been the act of marriage; it requires, by definition, a legal act. See Llewellyn, *Behind the Law of Divorce: I*, *supra* note 38.

98. See Janet Halley, *What is Family Law: A Genealogy Part II*, 23 YALE J.L. & HUMAN. 189, 290–91 (2011) (describing the divisions that separate family law and noting that ignoring rules regarding death “means that the basic contemporary family law course ignores the exit rules of half of the marriages”).

99. See Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 967 (1987) (“The way death is seen in estate planning is ownership. . . . The way ownership is seen in estate planning is in death. . . . What reconciles death with the ownership of property is the family. The family is the lens through which we understand death as the death of an owner and property as something owned by dead people.”).

100. This assertion is based on intestacy laws rather than the design of individual wills. Parties can contract for different arrangements upon death, but what the default laws have to say in



places the differences between these relationships into high relief.<sup>101</sup> When death occurs in the context of a marital relationship, intestacy laws generally recognize the spouse as the beneficiary of a majority of the property that may remain.<sup>102</sup> Even where a will specifies an alternative arrangement, most states have some version of an elective share, which allows a disinherited surviving spouse to request a percentage of the decedent's property.<sup>103</sup> If, however, the death occurs in the context of a non-marital relationship, most laws do not recognize that relationship, nor distribute any property based on that relationship, despite some movement in that direction.<sup>104</sup>

But in both instances, the fact of death does not inevitably end a family relationship as a legal or a factual matter. In the context of a marriage, the death of a partner continues to define the surviving spouse—the terms widow<sup>105</sup> and widower<sup>106</sup> depend for meaning directly on the deceased partner and the marital relationship held during life.<sup>107</sup> Death that takes place in the context of a non-marital, yet intact relationship also does not necessarily end that relationship.

the absence of private contracting is generally expressive on this point. *See* Mary Louise Fellows, *Pride and Prejudice: A Study of Connections*, 7 VA. J. SOC. POL'Y & L. 455, 465–66 (2000) (“The function of heirship laws is to accomplish a decedent's donative intent in the absence of a will, and they do that in a way that reflects society's view of fairness and its commitment to promote familial-type ties.”).

101. Although the default rules regulating property distribution upon the death of a spouse may be less generous than those upon divorce. *See* Rosenbury, *supra* note 96, at 1231 (showing that property distribution upon death may often be less favorable to a spouse than property distribution upon divorce).

102. *See* Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787, 793–98 (2012) (citations omitted) (explaining that the Uniform Probate Code leaves the majority of the estate to the surviving spouse and while proposals for including unmarried couples have been created, the Code has not yet incorporated them).

103. *See* Lynne Marie Kohm, *Why Marriage Is Still the Best Default Rule in Estate Planning Conflicts*, 117 PENN. ST. L. REV. 1219, 1223–24 (2013) (citing JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 60 (7th ed. 2005)) (noting that almost all states protect against spousal disinheritance through elective or forced shares that is not provided for by will).

104. Some states, including Vermont, Hawaii, California, and New Hampshire recognize unmarried couples that have formalized their relationship into a civil union or domestic partnership. *See* Jennifer Seidman, Comment, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. COLO. L. REV. 211, 229, 231 (2004) (analyzing the shortcomings of the Uniform Probate Code in not recognizing surviving committed partners although noting that some state laws do).

105. “A woman whose husband has died and who has not married again.” OXFORD ENGLISH DICTIONARY 1497 (2d ed. 2009); *see also* Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1647 (2003) [hereinafter Dubler, *In the Shadow of Marriage*] (“Widows have long remained squarely in marriage's shadow, both socially and legally.”).

106. “A man whose wife has died and who has not married again.” OXFORD ENGLISH DICTIONARY 1497 (2d ed. 2009).

107. *See* Dubler, *In the Shadow of Marriage*, *supra* note 105, at 1647–48 (noting with respect to the widow in particular that her “legal identity has long remained linked to her status as the (former) wife of her (deceased) husband”).

Even though the legal recognition of non-marital relationships in intestacy is weaker,<sup>108</sup> the relationship may continue in reality. The surviving spouse or partner may still live in a house that was shared by the couple, or rely on any joint savings that were accumulated during the relationship. Moreover, death does not put an end to the extended family. The parents of the deceased spouse or partner may have a desire to remain with the surviving individual, as would children from the relationship.<sup>109</sup>

Including death in the discussion of family relationships emphasizes that these moments exist as a matter of fact, separate from any normative bent. Indeed, in most cases death is a uniquely undesired end to a relationship by at least one of the partners; it is nevertheless an event that affects and defines that relationship. Divorce and separation are addressed in a similar manner—as matters of fact that occur within relationships, with subsequent repercussions as a matter of law.<sup>110</sup>

Death, like divorce and separation, is integral to the structure of the American family. Together, accounting for these events contributes to a more complete, and more accurate, understanding of the family in both its legal and factual capacity.

### III. THE FAMILIES OF IMMIGRATION LAW

The families regulated by immigration law are typically understood to be unified families.<sup>111</sup> Indeed, “[m]arriage has always played a crucial role”<sup>112</sup>: the

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108. See Peter J. Harrington, Note, *Untying the Knot: Extending Intestacy Benefits to Non-traditional Families by Severing the Link to Marriage*, 25 J. CIV. RTS. & ECON. DEV. 323, 335–41 (2011) (noting the small number of states that extend intestacy benefits for same-sex couples is where their relationship is legally recognized and comparing it with the lesser number of states that grant intestacy rights to unmarried opposite-sex couples).

109. For instance, the family members affected by the now-defunct policy of deporting an immigrant widow or widower upon the death of the American spouse prior to gaining permanent status went beyond the individuals to the marriage. See, e.g., Editorial, *End the ‘Widow Penalty,’* N.Y. TIMES, April 28, 2009, at A22 (noting that “[a]dvocates for shattered families – grieving widows and their young children, grandparents about to be bereaved for a second time, as their grandchildren are deported, have sought legal relief for years”); see also discussion *infra* Part II.C.

110. Even though these latter two forms of dis-unity involve an element of choice, it should not obscure the conditions in which divorce or separation may occur. Divorce rates and marriage rates correlate with socioeconomic well-being—“[t]hose with higher education and better economic prospects are more likely to become married, to stay married, and to have children within marriage.” Smock & Manning, *supra* note 84, at 96 (citing to numerous studies supporting this point). While these conditions are not the subject of this piece, they serve to contextualize the American family; these statistics also suggest that failing to institute a robust vision of dis-unity in the rules regulating family-based immigration may have adverse class-based repercussions.

111. But for, of course, the separation caused by geography.

112. *Immigration Marriage Fraud: Hearing Before the Subcomm. on Immigration & Refugee Policy of the Comm. on the Judiciary*, 99th Cong. 3 (1985) (“Marriage has always played a crucial

majority of visas granted in 2011 and 2012 under the “immediate relative” category were given to spouses,<sup>113</sup> while family-based visas for legal permanent residents issued on the basis of a spousal relationship accounted for twenty-six percent of the second preference visas in 2011 and twenty-eight percent in 2012.<sup>114</sup> For each visa issuance, the marital relationship was the necessary precondition.<sup>115</sup>

But, as we have seen, adult relationships experience divorce, separation, death. And immigration law grants status in instances where such relationships—both marital and non-marital—have dissolved. Given the emphasis placed on family unity, discussions of immigration law have heretofore vastly underappreciated the moments of rupture that its rules allow even where status is premised on those family relationships.<sup>116</sup>

This Part identifies and analyzes the immigration provisions that grant immigrant or nonimmigrant status in the context of the three different forms of dissolution that a couple may experience.<sup>117</sup> Certain provisions acknowledge family dis-unity directly and purposely; others address it tangentially, but implicate it nevertheless.<sup>118</sup> In each instance, this Part foregrounds a discussion of dis-unity that typically remains unnoticed. At its core descriptive, this Part aims to show where and how immigration law accommodates the fact that families experience change. In so doing, it sets out the necessary foundation to

role in the laws and policies governing both the immigration and naturalization of aliens.”) (statement of Hon. Alan C. Nelson, Comm’r, Immigration & Naturalization Service).

113. U.S. DEP’T OF HOMELAND SECURITY, 2011 YEARBOOK OF IMMIGRATION STATISTICS tbl.7 (2012), *available at* [http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois\\_yb\\_2011.pdf](http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf) [hereinafter 2011 YEARBOOK OF IMMIGRATION STATISTICS]; 2012 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 1, tbl.7. “Immediate relatives” are defined as the spouse, children, or parents of a United States citizen. 8 U.S.C. § 1151(b)(2)(A)(i) (2012).

114. 2011 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 113, tbl.7; 2012 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 1, tbl.7. Second preference visas include spouses, children, and unmarried children of legal permanent residents. *Id.* These numbers do not include statistics for derivative spousal visas, which would greatly increase the quantity.

115. *Cf.* 8 U.S.C. § 1186a(b)(1)(A) (2012) (authorizing the Secretary of Homeland Security to revoke the residency status of an alien if the qualifying marriage is terminated or is found to have been fraudulent).

116. This Article addresses the immigration provisions that explicitly allow for the possibility of divorce in granting immigration status. Such provisions are typically structured as exceptions in a statutory context that premises status on marriage. *See* 8 U.S.C. § 1186a(c)(4) (outlining different waivers which take into account divorce).

117. This section focuses on claims where the family relationship is the principal basis for admission and the immigrant is the principal beneficiary—this excludes derivative beneficiaries, such as visas allotted to the spouse of a principal beneficiary’s employment visa, diversity visa, or asylum visa. The individuals in this latter category oftentimes have a similar path to status, but with some differences given that they are derivative of the primary beneficiary’s claim.

118. Once again, Halley and Rittich’s definitions of Family Law 1, 2, and 3 provide a useful model. *See* Halley & Rittich, *supra* note 25.

better understand, and critically investigate, the ways that immigration law relies on the family unit in deciding who can enter the United States.

#### A. Divorce

Even where the marital relationship forms the basis for admission, obtaining a divorce does not necessarily end an immigrant's ability to remain in the United States prior to receiving permanent legal status. The Immigration and Nationality Act ("INA") currently allows an immigrant to divorce an American citizen without defeating conditional status in two types of circumstances—divorce based on what this Article describes as a no-fault model,<sup>119</sup> and divorce based on a fault model, the latter of which typically involves allegations of domestic violence.<sup>120</sup> Placing immigration law's recognition of divorce within these two general categories is useful insofar as it captures the fact that some rules require specific reasons before allowing divorce to not defeat status—hence the term fault-based—while others require none—hence the term no-fault—even though the immigration provisions do not exactly track the requirements of state divorce laws.<sup>121</sup> The state law-based analogy also serves to highlight how immigration law has come to acknowledge the termination of legal ties in ways that mirror domestic family law—both have gradually expanded their acceptance of divorce by choice.

While the immigration provisions clearly frame divorce as an exception to granting status on the basis of a family relationship,<sup>122</sup> legal actors throughout the system express awareness that divorce is a feature of American families that the immigration rules cannot, and in many instances do not, ignore. Immigration law thus accepts that Americans who marry immigrants—who may themselves be on the path to becoming American—divorce. Embedded in this acceptance is the recognition that divorce does not necessarily end immigration status, just as it does not necessarily end the family.

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119. 8 U.S.C. § 1186a(c)(4)(B). These divorces are identified as "no-fault" given that there is no requirement that reasons be given for the divorce. See discussion *infra* Part III.A.1.

120. *Id.* § 1186a(c)(4)(C). These are considered "fault-based" grounds because they depend on allegations of fault on the part of one of the parties. See discussion *infra* Part III.A.2.

121. Potentially instructive too is the relationship between no-fault and fault-based divorce in family law, which is one of gradual liberalization. Fault-based divorce was the first step in recognizing the possibility of divorce in states that had previously not allowed a couple to divorce at all. "A divorce action was, in form, an adversary lawsuit. . . . State statutes contained lists of bad deeds that constituted 'grounds' for divorce." See Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1501 (2000) (describing the history of divorce from fault-based to no-fault grounds). Currently, no-fault divorce is the norm. *Id.* at 1500.

122. See 8 U.S.C. § 1186a(c)(4)(B) (providing the "good faith" divorce waiver).

### 1. “No-Fault” Divorce

Perhaps ironically, the specific immigration provision that permits a divorce to take place prior to an immigrant’s receipt of permanent status—Section 216 of the INA—was instituted in the context of an increase in the requirements imposed on spousal visas. In 1986, Congress passed the Immigration Marriage Fraud Amendment (“IMFA”) in an effort to decrease the incidence of marital fraud.<sup>123</sup> Legislators presented the measure as necessary to prevent immigration law’s protection of “nuclear families from separation,” to lead to the admission of individuals in “fraudulent marriage[s].”<sup>124</sup> The IMFA’s most significant reform was establishing a two-year conditional residency period for a marriage less than two years old upon the date of requesting a visa.<sup>125</sup> To adjust to permanent status at the end of the two-year period, the IMFA required the married couple to jointly petition the Attorney General, and agree to submit to an interview.<sup>126</sup>

In its tougher regulation of marriage, however, the IMFA provided a waiver of the joint petitioning requirement upon the event of a divorce prior to the end of the two-year conditional residency period.<sup>127</sup> The IMFA placed strict limits on the type of divorce it would allow in granting permanent status—the qualifying marriage must have been entered into in “good faith” and the divorce initiated “by the alien spouse for good cause.”<sup>128</sup> In its initial formulation, immigration law set a higher bar for divorce than even the state fault-based laws of the time: a finding of fault in the underlying divorce proceeding was not necessarily “good cause” for purposes of the immigration proceeding.<sup>129</sup>

123. Immigration Marriage Fraud Amendment, Pub. L. No. 99-639, 100 Stat. 3537 (1986). Since then, the report containing proof of the fraud was determined to have been misleading. *See* Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J.L. & FEMINISM 23, 33 (1997) (noting that Congress’s “obsession with ‘fraud’ . . . is traceable to a since-debunked Immigration and Naturalization Service (INS) estimate”); *see also INS Admits Fraud Survey Not Valid*, 66 NO. 35 INTERPRETER RELEASES 1011 (1989) (explaining that a Service official testified that the 1984 INS survey of marriage fraud was “statistically invalid and lacked any probative value”).

124. H.R. REP. NO. 99-906, at 6 (1986).

125. *Id.* at 7 (applying to both a spouse of a U.S. citizen under the “immediate relative” category or for the spouse of a legal permanent resident under the second preference category).

126. Immigration and Nationality Act of 1986, Pub. L. No. 99-639, § 216(c)(1), 100 Stat. 3537.

127. *Id.* § 216(c)(4)(B). The IMFA also recognized a second exception based on whether deportation would cause “extreme hardship.” *Id.* § 216(c)(4)(A).

128. *Id.* § 216(c)(4)(B).

129. *See* 53 Fed. Reg. 30,020, 30,021 (Aug. 10, 1988) (explaining that “a finding by the court that the petitioning spouse was at fault shall not be deemed to be conclusive evidence that the alien spouse sought termination of the marriage for good cause, nor shall a divorce obtained in an area which does not require the determination of fault be deemed to be evidence that the alien spouse sought termination of the marriage for good cause”).

Despite these stringent requirements, the IMFA acknowledged that divorce would not always result in a loss of legal status. Congress's decision marked a pronounced departure from administrative opinions on the issue. Prior to the Act's passage, the Board of Immigration Appeals ("BIA") had not allowed marriages that were legally terminated, or that were experiencing marital troubles, to confer immigration status. In *Matter of Sosa*, the BIA considered a separation between husband and wife; it held that even though the marriage had been valid at its inception, the husband's permanent resident status would be revoked because the marriage was no longer "viable" at the time of the visa application.<sup>130</sup> The BIA reasoned that because the Act was meant "to prevent the separation of families and to preserve the family unit,"<sup>131</sup> conferring benefits on the immigrant spouse in "a nonviable or terminated" relationship would not further that end.<sup>132</sup> The BIA interpreted the family-based provisions to encompass only a unified, and intact, marital family.<sup>133</sup>

Federal courts, however, expressed a reluctance to rely on marital trouble as a proxy for assessing the validity of the marriage.<sup>134</sup> Prior to *Matter of Sosa*, the Ninth Circuit in *Bark v. INS* addressed a slightly different question—whether the marriage itself was invalid at the outset because the couple was separated at the time of adjusting status.<sup>135</sup> The court answered in the negative, and overturned the denial of the spousal petition.<sup>136</sup> Reasoning that "evidence of separation, standing alone, cannot support a finding that a marriage was not bona fide when it was entered," the court recognized that "[c]ouples separate, temporarily and permanently, for all kinds of reasons that have nothing to do with any preconceived intent not to share their lives."<sup>137</sup> Rather than rely on immigration law's general purpose to preserve intact family units, the *Bark* court placed the family of immigration law within the broader context of American families. "Aliens," it declared, "cannot be required to have more conventional or more successful marriages than citizens."<sup>138</sup>

The BIA eventually agreed with the Ninth Circuit that "a fraudulent or sham marriage [is] different from a nonviable or nonsubsisting one," and held that the

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130. *Matter of Sosa*, 15 I. & N. Dec. 572, 574 (B.I.A. 1976), *overruled by* *Matter of Boromand*, 17 I. & N. Dec. 450 (B.I.A. 1980).

131. *Id.* (citing H.R. REP. NO. 82-1365, at 38 (1952)).

132. *Id.* (citing *Matter of Lew*, 11 I. & N. Dec. 148, 149 (D.D. 1965)).

133. *Id.*

134. *See, e.g., Bark v. INS*, 511 F.2d 1200, 1202 (9th Cir. 1975) (holding that evidence of separation does not conclusively demonstrate that a marriage was not bona fide when entered).

135. *Id.*

136. *Id.*; *see also Chan v. Bell*, 464 F. Supp. 125, 130 (D.C.C. 1978) ("INS has no expertise in the field of predicting the stability and growth potential of marriages—if indeed anyone has—and it surely has no business operating in that field.").

137. *Bark*, 511 F.2d at 1202. The court further included examples of possible reasons for the separation: "calls to military service, educational needs, employment opportunities, illness, poverty, and domestic difficulties." *Id.*

138. *Id.*

latter could not alone be the basis for denying an application to adjust status.<sup>139</sup> It continued, however, to reject petitions where a separation had been formally agreed upon by the parties to the marriage,<sup>140</sup> and where the marriage had been legally dissolved.<sup>141</sup>

By including a waiver based on divorce then, the IMFA clearly departed from the BIA's decisions on the issue. The IMFA also refused to follow the Department of Justice's proposal during the hearings leading up to the Act to include "explicitly that there must be an actual family unit at the time of application for permanent residence and that separation of the spouses will result in the denial of the permanent resident status."<sup>142</sup> The Department of Justice had defined "separation" liberally to "include actually living apart or having initiated any action to dissolve or annul the marriage."<sup>143</sup> Instead, the IMFA's final rule was more aligned with the reality described by the president of the American Immigration Lawyers Association, Jules Coven during the hearings; in explaining how allowing for divorce would impact the aim of family reunification, he appealed to the reality of American families—describing the decision as "a very personal" one, Coven noted simply that "people get divorced in the United States."<sup>144</sup>

In 1990, Congress eliminated the requirements that the marriage be terminated for "good cause" and the divorce initiated by the immigrant spouse.<sup>145</sup> Describing the difficulties in proving "good cause," Congress relied on the general rise in states' "no-fault" divorce rules, which had done away with determinations of culpability.<sup>146</sup> While Congress's decision was motivated by a particular concern over marriages involving domestic violence,<sup>147</sup> the changes resulted in divorce by choice for all immigrants seeking a waiver.<sup>148</sup>

139. Matter of McKee, 17 I. & N. Dec. 332, 333 (B.I.A. 1980).

140. Matter of Lenning, 17 I. & N. Dec. 476, 479 (B.I.A. 1980).

141. Matter of Boromand, 17 I. & N. Dec. 450, 453–54 (B.I.A. 1980).

142. H.R. REP. NO. 99-906, at 10 (1986).

143. *Id.*

144. Senator Simpson inquired: "If the reason for granting spouses our most very preferred immigrant status is family reunification . . . what justification do you see for permanent grant of residence status to an alien who divorces his wife within a matter of a few months after the marriage?" Jules Coven replied by appealing to the context in which marriages occur: "I think what happens is that by the very frailties of marriage and human beings, . . . this is a very personal situation in many cases." *Immigration Marriage Fraud: Hearing Before the Subcomm. on Immigration & Refugee Policy of Comm. on the Judiciary*, 99th Cong. 89 (1985).

145. Immigration Act of 1990, Pub. L. No. 101-649 § 701(a)(2), 104 Stat. 4978, 5085.

146. H.R. REP. NO. 101-723, pt. 1, at 51 (1990) ("[M]any states have no-fault divorce laws which make it impossible for an alien spouse to establish that the marriage was terminated for good cause.").

147. See *id.* ("The independent waivers do not address the issue of battered spouses and children."). The amendments to the IMFA based on concerns raised by abusive relationships will be discussed further in the following section. See discussion *infra* Part I.A.III. For a thorough discussion of the ways the "good cause" provision was problematic in the context of abuse, see Janet M. Calvo, *Spouse-based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L.

These amendments remain in place today.<sup>149</sup> A “good faith” waiver is granted without requiring evidence of “good cause.”<sup>150</sup> And the BIA affirms grants of waivers without delving into the validity of the reasons for the divorce. In a recent decision upholding an Immigration Judge’s (“IJ”) grant of a good faith waiver, the BIA relied on testimony explaining “how the respondent was first introduced to her husband, . . . where and when they were married, . . . the financial problems which developed after they were married, and her husband’s filing for, and securing, a divorce the year after they had been married.”<sup>151</sup> The court did not question the reasons for the divorce as they were irrelevant to “the amount of commitment by both parties to the marital relationship,” even if eventually terminated.<sup>152</sup> Decisions denying the petitioner’s request for a waiver also remain focused on whether the marriage was entered into in “good faith” and whether the relationship during the marriage supported such a determination.<sup>153</sup>

Similarly, federal courts continue to reiterate their reluctance to meddle with a couple’s relationship: “we confine our inquiry to evidence relevant to the parties’ intent at the time of marriage and refrain from imposing our own opinions about what a ‘real’ marriage is or should be or how parties in such a marriage should behave.”<sup>154</sup> Neither the reasons for the divorce, nor the fact of

REV. 593, 609–13 (1991) and Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections For Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL’Y & L. 95, 101–05 (2001).

148. 8 U.S.C. § 1186a(c)(4)(B) (2012).

149. This statute has not been amended since it was codified in 2012. 8 U.S.C. § 1186a.

150. *Id.* § 1186a(c)(4). This is not to say that the burden of proof is any lower—in fact, it remains difficult to satisfy. See 115 AM. JUR. 3D *Proof of Facts* § 10 (2010) (describing the “level of proof” as “extremely high”). Given this high burden, some practice guides suggest that filing for divorce on fault-based grounds may help in proving the good faith question. *Id.*

151. *In re Rosita Lapinid Thompson*, A075 721 622, 2008 WL 5244721, at \*2 (B.I.A. 2008); see also *In re Ala Jihad Sayyed*, A096 079 160, 2008 WL 5025264, at \*1 (B.I.A. 2008) (remanding to the IJ based on new testimony that respondent entered marriage in good faith by marrying, living together, and later divorcing based on “cultural differences”); *In re Rosa Berrocal*, A47 685 690, 2008 WL 486847, at \*1–2 (B.I.A. 2008) (affirming the grant of a waiver based on divorce given that the marriage was entered into in good faith, but “the relationship [later] fell apart through no fault of her own” and the U.S. citizen spouse agreed to a divorce).

152. *In re Thompson*, 2008 WL 5244721, at \*2.

153. See, e.g., *In re Alba Gomez*, 2007 WL 4707537, at \*1 (B.I.A. 2007) (denying waiver based on consideration of post-marital conduct such as whether taxes were jointly filed; whether the couple had children; whether they lived together as husband and wife); *In re Niranjan Kasturi*, 2007 WL 4707455, at \*2 (B.I.A. 2007) (affirming denial of waiver based on divorce because post-marital conduct included little evidence that couple lived together did not indicate good faith marriage).

154. *Damon v. Ashcroft*, 360 F.3d 1084, 1089 (9th Cir. 2004). The two-year conditional residency requirement could, however, be understood to impose a de facto inquiry into the relationship. See 8 U.S.C. § 1186a(c)(1) (2012) (requiring documentary evidence to prove that the marriage was not entered into for the purpose of evading the immigration laws of the United States).



divorce, are germane to the court's opinion regarding the merits of the waiver.<sup>155</sup> Divorce, by choice, within a scheme that relies on the marital relationship, is very much accepted.

Immigration law also accommodates divorce where the foreign spouse has not yet obtained the more "permanent" status of conditional resident, but was admitted on the basis of a nonimmigrant K-1 visa. The K-1 visa allows the soon-to-be spouse of a U.S. citizen both admission and nonimmigrant status until the marriage, which must take place within ninety days of entry.<sup>156</sup> This so-called "fiancé" visa<sup>157</sup> is conditioned on the marriage that must take place after arrival;<sup>158</sup> if the marriage is not completed within ninety days, the fiancé becomes deportable.<sup>159</sup> Despite the weaker family link necessary for admission—entry is premised only on the promise of marriage—the BIA recognized the possibility of divorce prior even to the passage of the IMFA.<sup>160</sup> While the IMFA heightened the standards for issuing a K-1 visa and eliminated the procedure by which a fiancé almost automatically acquired lawful permanent status,<sup>161</sup> it continued to accommodate divorce in certain circumstances.<sup>162</sup>

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155. *Damon*, 360 F.3d at 1089 (affirming that "the sole inquiry in determining whether a marriage was entered into in good faith is whether the parties intended to establish a life together at the time of marriage"). Indeed, the court only noted that there were a "few problems" in the marital relationship and the spouse, Scott Damon, left after a year of living together. *Id.* at 1086. While the couple attempted to reconcile, they filed for divorce after four years of marriage. *Id.* This reluctance to question the reasons for the divorce holds true where the court considers either the intent of the parties at the time of the marriage to establish a life together, or their intent to evade the law, both of which do not focus on the divorce itself. See Marcel De Armas, Note, *For Richer or Poorer or any Other Reason: Adjudicating Immigration Marriage Fraud Cases Within the Scope of the Constitution*, 15 AM. U.J. GENDER SOC. POL'Y & L. 743, 750–52 (2007) (describing a circuit split among courts who consider whether a couple intended to build a life together and courts who consider whether the purpose of the marriage was to evade immigration law, noting that the two tests consider much of the same evidence). In certain circumstances, however, the intent to evade the law test may be more difficult to successfully pass than the intent to establish a life together test. See Kerry Abrams, *Marriage Fraud*, 100 CAL. L. REV. 1, 34–37 (2012) (noting that the "'evade the law' test sweeps more broadly than the 'establish a life' test").

156. Only U.S. citizens are permitted to sponsor their fiancés; legal permanent residents do not have this ability. 8 U.S.C. § 1101(a)(15)(K)(i) (2012); 22 C.F.R. § 41.81(a) (2013) (providing the requirements to classify as a nonimmigrant fiancé(e)).

157. While Congressional language typically uses the feminine form of "fiancée," see H.R. REP. NO. 91-851, at 4 (1970), this article uses the masculine form, as French rules of grammar dictate that if there is even one male included in the term, then the masculine form must be used. It is rare that sex-based presumptions—one in the statute, the other in the rules of grammar—work at cross-purposes to each other.

158. *Id.* at 10.

159. 8 U.S.C. § 1184(d).

160. *Matter of Dixon*, 16 I. & N. Dec. 355, 357 (B.I.A. 1977). In so deciding, the BIA rejected any need for harmony between the spouse-based and fiancé-based petitions for adjustment. *Id.* It continued to allow for divorce post-IMFA. *Matter of Sesay*, 25 I. & N. Dec. 431, 443–44 (B.I.A. 2011).

161. 8 U.S.C. § 1255(d) (Supp. IV 1982); see *Matter of Sesay*, 25 I. & N. Dec. at 437–38 (summarizing history of amendments to K-1 visa).

Federal courts have interpreted the IMFA to allow as much: in *Choin v. Mukasey*, the Ninth Circuit affirmed a petition to adjust status based on a fiancé visa after a divorce had taken place, reasoning “the statute focuses on the good faith of the marriage, not the marriage’s success or failure.”<sup>163</sup> Divorce, without further justification, is squarely recognized in the context of provisions that rely on the event of marriage.

Of course, Congress’s statutory acknowledgment of divorce is not without restrictions. The provision is available only in the form of a waiver of the termination of status triggered by the divorce itself, which shifts the burden to the applicant to prove the validity of the initial marriage; the determination is also discretionary.<sup>164</sup> Moreover, the broader context in which the explicit recognition of divorce has become relevant is an increase in the requirements placed on marriages between American citizens or legal permanent residents (“LPR’s”), and foreign nationals.<sup>165</sup> Notwithstanding, Congress and courts accept the realities of divorce within a scheme that prioritizes family relationships; the IMFA allows for divorce as an incident to marriage.<sup>166</sup>

## 2. “Fault”-Based Divorce

In creating the two-year conditional residency period, the IMFA made no explicit allowance for an immigrant spouse involved in an abusive relationship.<sup>167</sup> The situation of a battered immigrant spouse brought into high

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162. See *Matter of Sesay*, 25 I. & N. Dec. at 440-41.

163. *Choin v. Mukasey*, 537 F.3d 1116, 1121 (9th Cir. 2008) (declining to impose a “durational requirement” on the marriage of a K-visa holder based on when the government gets to the application).

164. 8 U.S.C. § 1186a(c)(4) (“The Attorney General, in the Attorney General’s discretion, may remove the conditional basis of the permanent resident status for an alien who fails to meet the requirements of paragraph (1) if the alien demonstrates” the two grounds for waiver.).

165. ALEINIKOFF, *supra* note 26, at 342 (noting that in addition to imposing the two-year requirement on marriages that were less than two years old at the time of requesting a spouse-based visa, the IMFA tightened the requirements for fiancé visas, created criminal sanctions for involvement with marital fraud, and increased restrictions on future immigration for persons determined to have been involved in marriage fraud).

166. See 8 U.S.C. § 1186a(c)(4)(B). The “good faith” waiver depends on the very fact of divorce; other waivers do not. The “extreme hardship” waiver, for example, neither addresses nor depends on the dissolved relation. See *id.* § 1186a(c)(4)(A). In considering “extreme hardship” the reviewer should “take into account only those factors that arose subsequent to the alien’s entry as a conditional permanent resident” and that are “extreme” rather than a result incident to removal. 8 C.F.R. § 216.5(e)(1) (2014). This may, and often does, include the hardship that would fall on one’s family. See, e.g., *Agyeman v. INS*, 296 F.3d 871, 889 (9th Cir. 2002) (explaining that the “extreme hardship” waiver includes hardships to petitioner, wife, children, or parents). There is, however, no requirement that the hardship fall on that family, nor an explicit mention of divorce.

167. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 216(c)(4), 100 Stat. 3537 (including only “extreme hardship” waiver and “good faith” divorce waiver but not a “battered spouse” waiver).

relief the potential perils of the INA's intact family requirement over a two-year period.<sup>168</sup> To address this omission, Congress added a battered spouse waiver in 1990;<sup>169</sup> four years later, the Violence Against Women Act ("VAWA") added a self-petitioning process for immigrant battered spouses and children who had not yet received conditional residency status.<sup>170</sup>

In order to minimize the risk of remaining within an abusive relationship, current immigration laws are currently flexible.<sup>171</sup> While there are often many obstacles to leaving a batterer, including the burden imposed by the immigration provisions themselves,<sup>172</sup> the law permits an immigrant to divorce, or leave the relationship without a divorce, where status was premised on that marital relationship. These moments form part of a larger series of instances that occur in a framework that relies on family relationships to confer status.

#### *a. Battered Spouse Waiver*

In passing the Immigration Act of 1990 ("1990 Act"), the House of Representatives articulated a concern over the strict requirement that a marital unit be intact to grant status: as such, "[p]resent law does not ensure that a battered alien spouse or child will not be forced to remain in an abusive relationship for fear of deportation."<sup>173</sup> To address the problem, the 1990 Act added a waiver on the basis of domestic violence where "the qualifying marriage was entered into in good faith by the alien spouse and during the marriage the

168. H.R. REP. NO. 101-723, pt. 1, at 51 (1990).

169. *Id.*

170. Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40701(a)(iii)(I), 108 Stat. 1953.

171. *See* H.R. REP. NO. 101-723, pt. 1, at 51.

172. *See, e.g.,* Mariela Olivares, *A Final Obstacle: Barriers to Divorce for Immigrant Victims of Domestic Violence in the United States*, 34 HAMLINE L. REV. 149, 153 (2011) (identifying the "social, cultural, and legal difficulties facing immigrants who seek divorce from abusive spouses" and the inadequacies of the immigration system in ensuring the protection of battered immigrant spouses); Tien-Li Loke, *Trapped in Domestic Violence: The Impact of United States Immigration Laws on Battered Immigrant Women*, 6 B.U. PUB. INT. L.J. 589, 589 (1997) (presenting the particular problems faced by abused immigrant women that may prevent them from seeking help and criticizing immigration laws for only addressing problem created by immigration without being attune to crossover issues such as the ability to support themselves); Michelle J. Anderson, Note, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1416 (1993) (identifying how female conditional residents are at risk of abuse and criticizing Congressional amendments for imposing a framework that "allows husbands to control the petitioning process for women who have not yet obtained conditional status, establishes evidentiary requirements for adjusting from conditional to permanent status that the vast majority of immigrant women can never hope to meet, and ignores the community barriers facing immigrant women as well as immigrants' fear of bureaucratic entanglement").

173. H.R. REP. NO. 101-723, pt. 1, at 51.

alien spouse or child was battered by or was the subject of extreme cruelty perpetuated by his or her spouse.”<sup>174</sup>

Given the asserted importance of creating avenues of exit from the abusive relationship, the 1990 Act accounted for the possibility of divorce or separation with relative ease. The regulations provided that the waiver could be granted “regardless of [the conditional resident’s] present marital status.”<sup>175</sup> That is, the conditional resident could be “residing with the citizen or permanent resident spouse, or may be divorced or separated”<sup>176</sup> when requesting the waiver, reflecting Congress’s awareness of the difficulties the abused spouse may encounter in leaving the relationship.<sup>177</sup> To minimize both the harm resulting from the relationship and the pressure to remain in that relationship,<sup>178</sup> the provision “create[d] an avenue of relief for a spouse or child caught in a detrimental relationship” while preserving status.<sup>179</sup>

The few cases that reach the BIA and federal courts typically reject the battered spouse petition based on a finding that the marriage was not entered into in good faith.<sup>180</sup> Nevertheless, the provisions of the INA protect the ability of a battered immigrant spouse to divorce, and otherwise leave the abusive relationship.<sup>181</sup>

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174. 8 U.S.C. § 1186a(c)(4)(C) (Supp. II 1988).

175. 8 C.F.R. § 216.5(e)(3)(ii) (1990).

176. *Id.*

177. *See* 136 Cong. Rec. H8642 (daily ed. Oct. 2, 1990) (statement of Rep. Slaughter) (“This waiver would not force the foreign spouse to seek a divorce and thus would avoid the question of good cause which must be considered in the good cause/good faith waiver and it would make it clear to abused spouses that there was an escape from their situations.”).

178. *See* 136 Cong. Rec. H8648–49 (daily ed. Oct. 2, 1990) (statement of Rep. Gilman) (“Under current law a damaging situation must be endured in order to maintain legal status in the United States.”).

179. *Id.* at H8648.

180. There is very little case law addressing this waiver and little elaboration about the reasons for denying or affirming it. *See, e.g.,* *Joha v. Gonzales*, 186 F. App’x 727, 728–29 (9th Cir. 2006) (affirming IJ’s conclusion that marriage was not bona fide and therefore petitioner could not qualify for a hardship waiver based on extreme cruelty of his former spouse); *Lata v. Ashcroft*, 117 F. App’x 525, 526 (9th Cir. 2004) (holding that substantial evidence supported IJ’s finding that marriage was not entered into in good faith and that spouse had not subjected her to extreme cruelty); *In re Henderson*, A75 787 471, 2006 WL 901316, at \*1 (B.I.A. Feb. 21, 2006) (affirming the IJ’s determination that the petitioner failed to prove she had entered into a bona fide marriage or had been subject to extreme cruelty).

181. 8 U.S.C. § 1186a(c)(4)(C) (2012). The United States Citizenship and Immigration Services does not track specific grants and denials of waivers, but provides statistics indicating that from 2008 to 2012 it has granted 24,627 waivers out of a total of 67,282 waiver applications (about thirty-six percent) and transferred another 24,768 to field offices for interviews. *See Improving the Process for Removal of Conditions on Residence for Spouses and Children*, app. A at 18 (Feb. 28, 2013), [http://www.dhs.gov/sites/default/files/publications/cisomb-conditional-residence-recommendation-final-02282013\\_1.pdf](http://www.dhs.gov/sites/default/files/publications/cisomb-conditional-residence-recommendation-final-02282013_1.pdf). It has denied about 3,398 cases outright, *id.*, which is about five percent of the total waiver applications filed.

*b. Violence Against Women Act*

The Violence Against Women Act of 1994 added further provisions to allow for divorce. Its amendments were intended to provide assistance to battered immigrants whose spouses had never filed an initial visa petition; it thus allowed them to self-petition from the outset.<sup>182</sup> The self-petitioning requirements set forth in the VAWA mirror some of those contained in the good faith waiver, and include that the self-petitioner prove that the marriage was bona fide, that the alien had been battered or subjected to extreme cruelty by the U.S. citizen or LPR spouse, and that removal would result in extreme hardship to the petitioner or the petitioner's children.<sup>183</sup>

The VAWA is, however, distinct from prior amendments to the immigration provisions in an important way—the immigration-related provisions make up only a small portion of a larger Act whose overall purpose is “to deter and punish violent crimes against women.”<sup>184</sup> The VAWA was concerned with violence against women generally and violence within the family specifically—“nowhere is the habit of violence harder to break than in the home.”<sup>185</sup> The VAWA recognized that this home included immigrant populations; as such, it was instrumental in placing immigrant women within its reach, emphasizing the importance of creating procedures to exit abusive relationships.<sup>186</sup> One concern specific to the immigrant woman married to an American citizen or LPR was her lack of status, which could be used as an additional tool of control by the batterer.<sup>187</sup> In providing for self-petitioning, the VAWA still required a marriage at the time of filing; however, divorce after the initial filing did not defeat the self-petition.<sup>188</sup>

Some criticisms voiced during the Congressional hearings leading up to the VAWA echoed earlier lamentations over the “broken” state of American families.<sup>189</sup> Patrick Fagan, president of the conservative think-tank The Heritage

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182. Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40701, 108 Stat. 1902.

183. *Id.* § 40701(a)(iii)(I), (II) An additional requirement that was missing from prior provisions was that the petitioner be “a person of good moral character.” *Id.* § 40701(a)(iv).

184. H.R. REP. NO. 103-395, at 25 (1993).

185. S. REP. NO. 103-138, at 41 (1993).

186. *See* H.R. REP. NO. 103-395, at 26 (“Many immigrant women live trapped and isolated in violent homes, afraid to turn to anyone for help. They fear both continued abuse if they stay with their batterers and deportation if they attempt to leave.”).

187. *See* H.R. REP. NO. 101-723, pt. 1, at 78 (1990) (“The purpose of this provision is to ensure that when the U.S. citizen or permanent resident spouse or parent engages in battering or cruelty against a spouse or child, neither the spouse nor child should be entrapped in the abusive relationship by the threat of losing their legal resident status.”).

188. H.R. REP. NO. 103-395, at 38 (closing “a loophole in the statute and ensures that in the case of abused spouses and abused children who are self-petitioning divorce may not be the basis for revocation of the petition”).

189. *Violence Against Women Act of 1999, Stalking Prevention and Victim Protection Act of 1999: Hearing on H.R. 1248 and H.R. 1869 Before the Subcomm. on Crime of the H. Comm. on the*

Foundation at the time, expressed concern over the VAWA's passage, given what he saw as its participation in creating "a culture of alienation and rejection that is deep within the family."<sup>190</sup> Citing to the increase in divorce rates and the number of children born outside of marital relationships, he voiced anxiety over "men and women who come together most intimately to bring a new child in the world," but who "cannot . . . stay together to raise the child."<sup>191</sup> Fagan's proposed solution—to re-unify the divisions that had arisen and "rebuild communities and families of care"<sup>192</sup>—was in many ways at odds with the various types of separation the VAWA ultimately allowed.

In 2000, Congress passed the Battered Immigrant Women Protection Act ("VAWA 2000"),<sup>193</sup> which expanded VAWA's recognition of the rupture that can befall a marital relationship by removing the requirement that the petitioner had to be married upon filing.<sup>194</sup> The petition could be submitted where a divorce had occurred up to two years prior to the filing—imposing a time limit similar to the conditional residency period—as long as there was a connection between the divorce and the battery or extreme cruelty.<sup>195</sup>

The VAWA self-petitioning provision remains largely the same to this day.<sup>196</sup> The laws regulating admission explicitly allow what would have been a

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*Judiciary*, 106th Cong. 49 (statement of Patrick Fagan, Heritage Foundation). See discussion *supra* Part I.A.

190. *Violence Against Women Act of 1999, Stalking Prevention and Victim Protection Act of 1999: Hearing on H.R. 1248 and H.R. 1869 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 49 (statement of Patrick Fagan, Heritage Foundation).

191. *Id.*

192. *Id.* at 54–55. Fagan believed the focus should be on decreasing rates of divorce and separation based on his belief that separation and divorce led to more violence: "We know now how to reduce the rates of divorce, and in one community they have reduced it by 50 percent. Now, if you take the divorce effect on the abuse, those who are divorced, there is a huge potential for abuse and things going wrong as a divorce, or even as a separation—particularly as a separation takes place." *Id.* at 50. His solution was to rebuild community primarily through faith-based organizations. *Id.* at 58–59.

193. Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1463, 1518. The point here is to demonstrate Congressional awareness and codification of the possibility of divorce for the battered immigrant spouse; this focus on divorce inevitably fails to capture the various improvements, and shortcomings, of the VAWA.

194. See *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. 8, 10 (2000).

195. 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc) (2000) (requiring proof of "a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse"); *id.* § 1154(a)(1)(B)(ii)(II) (applying same standard to the "spouse of a lawful permanent resident").

196. The Violence Against Women Act was reauthorized in 2005, Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960, and most recently in 2013, Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat. 54, without significant changes to the self-petitioning process.

family-based petition to become a petition that the foreign spouse submits alone, after a divorce.

### *B. Separation*

The INA also accounts for moments of non-legal separation, either because there has not yet been a finalized divorce, or because the relationship itself was never legally formalized. These two categories of separation—within marriage and outside of marriage—track the no-fault and fault distinctions that appear in immigration law’s acknowledgment of divorce. The first category of separation is akin to “no-fault” divorce because it grants status in the context of a marital relationship without requiring, as a matter of law, any reasons for the separation. The second category is akin to “fault-based” divorce because it grants status during moments of separation that involve allegations of domestic violence.

The latter category is expansive: it acknowledges a broad spectrum of couplings that immigration law does not include in its family-based scheme, such as non-marital same-sex and opposite-sex relationships. The individual seeking status may also be in a relationship with someone who is neither a U.S. citizen nor a legal permanent resident. Immigration law recognizes these relationships only implicitly, in situations that involve both domestic violence and assistance to law enforcement.<sup>197</sup> In these instances immigration law addresses the family indirectly, as status is based on the violence that takes place within the family relationship, rather than on the relationship itself.<sup>198</sup> Nonetheless, these relationships are the unstated premise for immigration status; bringing them to light provides a foundation for understanding the more varied family units that immigration law accepts.

#### *1. “No-Fault” Separation*

Marital trouble that leads to a non-legal separation does not necessarily defeat immigration status. Prior to the passage of the IMFA, federal courts already recognized the ability of a married couple to separate as a matter of fact and still adjust status.<sup>199</sup> These decisions were reached in the context of the “[c]ommon experience” that “[c]ouples separate.”<sup>200</sup> The BIA followed suit, acknowledging that “a separation in and of itself is no longer a valid basis for denial of a visa petition.”<sup>201</sup>

In passing the IMFA, Congress essentially codified these conclusions: it rejected the recommendation to deny status based on any separation between

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197. See discussion *infra* Part IV.B.

198. See discussion *infra* Part IV.B.

199. See discussion *supra* Part III.A.1.

200. *Bark v. INS*, 511 F.2d 1200, 1202 (9th Cir. 1975).

201. *Matter of McKee*, 17 I. & N. Dec. 332, 334 (B.I.A. 1980).

family members and declined to require strict marital unity.<sup>202</sup> While the IMFA does not explicitly provide a waiver based on a separation—as it does for a divorce—the BIA routinely recognizes adjustment of status where the couple is separated as a matter of fact, but not officially divorced.<sup>203</sup> A couple's separation is thus insufficient to defeat the immigrant spouse's adjustment to permanent status.<sup>204</sup>

## 2. "Fault-Based" Separation: U-Visas, Fiancés, and Non-Marital Relationships

The only relationship between unrelated adults that immigration law recognizes in granting permanent status is marriage.<sup>205</sup> Non-marital relationships—a couple engaged to be married, a couple living together without being married, or a couple in a civil union or domestic partnership—are not, without more, considered part of the family unit granted admission by the immediate relative and family-based preference categories.<sup>206</sup> These relationships may, however, form the basis for a type of nonimmigrant status established by the U-visa, created by the Victims of Trafficking and Violence

202. That said, the petitioning process instituted by the IMFA set up what can be thought of as a proxy viability determination. *See supra* notes 142–44 and accompanying text.

203. *See, e.g., In re Espinoza-Rivera*, 2005 WL 3709269, at \*1 (B.I.A. 2005) (holding that where husband and wife are separated, there is no need for the estranged spouse to testify where respondent was found credible and there is no need for the marriage to remain viable); *In re Yemane Tesfamariam Mekonnen*, 2007 WL 1520808, at \*1 (B.I.A. 2007) (noting that even though petitioner and wife had been living apart prior to the petition for adjustment, "[a] marriage that was viable at its inception but subsequently becomes non-viable remains a valid marriage for purposes of the immigration laws if there is no legal separation or divorce.").

204. *See, e.g., Hernandez v. Ashcroft*, 345 F.3d 824, 847–49 (9th Cir. 2003) (overturning denial of petition in part because the INS had improperly considered the separation between parties to a marriage noting the prior line of decisions by federal courts and BIA on the issue).

205. *See* 8 U.S.C. § 1186a (2012). While a variety of legal issues remain to be worked out, the Supreme Court's recent decision in *Windsor* indicates that same-sex marriages will also be recognized by federal immigration law. *See Janet Napolitano, Same-Sex Marriages*, U.S. CITIZENSHIP & IMMIGR. SERVICES (July 1, 2013), <http://www.uscis.gov/family/same-sex-marriages>. USCIS has already begun to recognize same-sex marriages and has set forth certain procedures for same-sex couples to follow. *See Same-Sex Marriages*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/family/same-sex-marriages> (last updated Apr. 3, 2014).

206. While fiancé visas are granted on the basis of a non-marital relationship, they are revoked where the relationship does not become marital upon ninety days of entry. 8 U.S.C. § 1184(d)(1) (2012). Immigration law does recognize, although not in the form of a family-based preference, "cohabitating partners" of long-term nonimmigrant visa holders: long-term nonimmigrants are allowed to have their non-marital partners accompany them on the basis of a B-2 visitor classification. *See Cohabiting Partners, Extended Family Members, and Other Household Members not Eligible for Derivative Status*, 9 FOREIGN AFF. MANUAL 41.31 N14.4 (2012) (stating that "B-2 classification is appropriate for aliens who are members of the household of another alien in long-term nonimmigrant status, but who are not eligible for derivative status under that alien's visa classification" which include "cohabitating partners").



Protection Act of 2000 (“TVPA”) and passed with the VAWA 2000.<sup>207</sup> The U-visa provides noncitizen crime victims with nonimmigrant status if they cooperate with law enforcement by reporting one of twenty-six enumerated criminal activities.<sup>208</sup> As such, the U-visa is not solely, or even directly, about family relationships. But, one of the criminal activities listed is “domestic violence,” which may take place in a relationship between individuals who are not married and who may not even include a U.S. citizen or legal permanent resident.<sup>209</sup>

In fact, the U-visa is often the only recourse a partner may have in order to remain in the United States where the intimate relationship is not marital. For instance, fiancés of U.S. citizens are allowed to enter on a K-1 visa, which provides nonimmigrant status until marriage.<sup>210</sup> If the marriage does not take place within the allotted time period,<sup>211</sup> the foreign spouse has no way of adjusting from a temporary to a permanent visa.<sup>212</sup> The situation changes, however, where the foreign fiancé has experienced domestic violence by the U.S. citizen fiancé;<sup>213</sup> if the noncitizen fiancé aids law enforcement in connection with the domestic violence, then the U-visa may provide continued nonimmigrant status for the noncitizen fiancé.<sup>214</sup> Albeit attenuated,<sup>215</sup> the domestic violence provisions provide battered fiancés a way of retaining status in the context of a dissolving, non-marital, relationship.<sup>216</sup>

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207. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

208. 8 U.S.C. § 1184(p)(1).

209. *Id.* § 1101(a)(15)(U)(iii) (listing the twenty-six criminal activities “or any similar activity”).

210. *Id.* § 1101(a)(15)(K). Thereafter, the foreign partner may be eligible to adjust to conditional residency status. *Id.*; see also discussion *supra* Part IV.A.

211. Or very close to the allotted ninety day period. See *Moss v. INS*, 651 F.2d 1091, 1093 (5th Cir. 1981) (holding that foreign spouse who was admitted on a K-visa was not deportable for getting married after ninety-two days where the parties intended to marry but facts beyond their control prevented them from getting married within the ninety days).

212. See 8 U.S.C. § 1101(a)(15)(K) (requiring a valid marriage with the petitioner within ninety days after admission).

213. There are many different types of domestic violence, including between children and parents or siblings; this article focuses on the domestic violence committed between partners.

214. See Adam B. Horowitz, Note, *Giving Battered Immigrant Fiancées a Way Out of Abusive Relationships: Proposed Amendments to the Immigration and Nationality Act*, 78 BROOK. L. REV. 123, 147–51 (2012) (citations omitted) (identifying the lack of self-petitioning available to abused foreign fiancés and outlining some of the U-visa’s shortcomings in filling the gap).

215. See Karyl A. Davis, Commentary, *Unlocking the Door by Giving her the Key: A Comment on the Adequacy of the U-Visa as a Remedy*, 56 ALA. L. REV. 557, 566–72 (2004) (criticizing the adequacy of the U-visa as a remedy for the spouse of an immigrant on an employment-based H1-B visa given that the relief is predicated on the criminal justice system, which many immigrant battered women fear).

216. There may be relationships that remain intact in some form despite the domestic violence and the domestic violence allegations. See Orloff & Kaguyutan, *supra* note 147, at 122–23 (highlighting some of the realities, such as economic dependency, that prevents a battered partner

The U-visa's domestic violence provision grants petitioners nonimmigrant status even where the relationship is not on the path to marriage.<sup>217</sup> By basing nonimmigrant status on the fact of domestic violence, immigration law implicitly acknowledges the domestic relationship in which the violence occurs.<sup>218</sup> While the VAWA is principally concerned with violence against women, the language of the statute is sex-neutral and allows both sexes to petition;<sup>219</sup> individuals in opposite-sex non-marital relationships,<sup>220</sup> same-sex non-marital relationships, and same-sex marital relationships<sup>221</sup> can apply.

An immigrant may also request a U-visa in the context of a relationship where neither partner is a U.S. citizen or legal permanent resident.<sup>222</sup> In its broad recognition of statuses—both of the individuals and the relationships they are in—the U-visa further allows claims of battery made by derivative

from leaving). Even these cases involve a rupture insofar as law enforcement has been brought in to investigate violence within the family.

217. See generally 8 U.S.C. § 1101(a)(15)(U) (2012) (describing the requirements for a petitioner to be eligible for a U-visa). The domestic violence provision in the VAWA depends on particular state laws' definition of domestic violence. 72 Fed. Reg. 53,018 (2007); see also Tahja L. Jensen, Comment, *U Visa "Certification": Overcoming the Local Hurdle in Response to a Federal Statute*, 45 IDAHO L. REV. 691, 697–98 (2009) (noting that "qualifying criminal activity may be different depending on a particular jurisdiction's definition"). State statutes typically recognize domestic violence in a variety of familial settings, including same-sex non-marital relationships. See, e.g., *Glater v. Fabianich*, 625 N.E.2d 96, 99 (Ill. App. Ct. 1993) (finding domestic violence in the context of nonrelated males who shared a common household). But see Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 495 (2008) (criticizing federal and state domestic violence laws for focusing on familial, romantic, and cohabitating relationships over abuse that may take place in other forms of personal relationships).

218. In deciding what constitutes domestic violence, there must be a domestic context. See, e.g., *State v. Hodges*, No. 11-0913 (Iowa Ct. App. 2012) (including unmarried cohabiting couples under the rubric of domestic violence in denying an ineffective assistance of counsel claim). The existence of dis-unity leading to the recognition of diverse forms of unity parallels the recognition of unity outside of marriage, which was precipitated by a separation in *Marvin v. Marvin*, 557 P.2d 106. See discussion *supra* Part I.B.

219. 8 U.S.C. § 1101(a)(15)(U)(i)(I); see also Sherizaan Minwalla, *Protecting Noncitizen Crime Victims Under the New U Visa Interim Regulations*, 08-01 IMMIGR. BRIEFINGS 1, 5 (2008) (noting that the U-visa applies equally to men and women, although the crimes, such as rape and domestic violence, are typically perpetrated against women).

220. See Ilene Durst, *Remedies for Non-Citizen Victims of Domestic Violence: A Brief History and Some Observations*, 32 T. JEFFERSON L. REV. 87, 91 (2009) (discussing the emergence of U-visas for non-citizens whose abusers also lacked status and who may be in non-marital relationships).

221. See Sana Loue, *Family Violence in the Context of Immigration: Sources and Solutions*, 06-12 IMMIGR. BRIEFINGS, Dec. 2006, at 7, 15 (noting that unlike self-petition mechanisms under VAWA, U-visas are available in the context of a same-sex relationship). These same-sex relationships may have included a marriage that the United States federal government used to not recognize.

222. H.R. REP. NO. 106-939, at 115 (2000) (Conf. Rep.) (providing that the U-visa was created specifically "for victims of certain serious crimes that tend to target vulnerable foreign individuals without immigration status").

beneficiaries of nonimmigrant visas, who have no way of remaining in the United States other than through their marital relationship with the principal beneficiary.<sup>223</sup>

By recognizing the incidence of domestic violence that ruptures family relationships, the U-visa actually promotes the admission of unified families.<sup>224</sup> Those who successfully attain U-visas may eventually adjust to permanent status if they have been physically present in the United States for a continuous period of three years and their presence is “justified” on humanitarian grounds, which include promoting “family unity.”<sup>225</sup> Additionally, the U-visa authorizes derivative beneficiaries to accompany the petitioner, thus taking into account other family members.<sup>226</sup>

The U-visa also leads to immigration laws acknowledgment of diverse family units. In addressing violence within the domestic realm, the U-visa sheds light on the existence of that realm, which may not bear the legal imprimatur of marriage.<sup>227</sup> Like the separation in *Marvin*, which precipitated the recognition of cohabiting couples in family law, accounting for the separation caused by domestic violence results in the immigration provisions’ recognition, even if indirectly, of a variety of family formations.

### C. Death

The death of an American spouse, like the decision to divorce an American spouse, does not always end an immigrant’s legal status when it takes place within a marriage.<sup>228</sup> The immigration provisions addressing the death of the American citizen, and the interpretation of those provisions, have increasingly acknowledged that death does not necessarily terminate the relationship held during life or the legal status based on that relationship.

Death differs from divorce and separation in that it typically does not involve an element of choice. But for a long time, immigration law was not more receptive to events dictated by chance. Until the Act of 1990,<sup>229</sup> the death

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223. See Davis, *supra* note 215, at 566–67 (discussing the H-4 visa where the nonimmigrant status is entirely dependent on marital relationship).

224. See Elizabeth M. McCormick, *Rethinking Indirect Victim Eligibility for U Non-Immigrant Visas to Better Protect Immigrant Families and Communities*, 22 STAN. L. & POL’Y REV. 587, 593 (2011) (arguing that the U-visa is consistent “with the goals of the [Victims of Trafficking and Protection Act] and with the broader goals of U.S. immigration law to facilitate family unity”).

225. 8 U.S.C. § 1255(m)(1).

226. *Id.* § 1101(a)(15)(U)(ii).

227. See generally 8 U.S.C. § 1101(a)(15)(U) (describing the instances where domestic violence allows a petitioner to be eligible for a U-visa).

228. See 8 U.S.C. § 1151(b)(2)(A)(i) (allowing for a self-petition for an alien whose citizen spouse passes away).

229. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

of a United States citizen spouse ended any visa petition that had been submitted on the basis of the marriage.<sup>230</sup> The only exception to this general rule was for cases where the petition had already been approved, and where “for humanitarian reasons revocation would be inappropriate” according to the discretion of the United States Citizenship and Immigration Services (“USCIS”).<sup>231</sup> The BIA had occasion to uphold this restrictive rule in a case where “the beneficiary [was] the widow of a citizen who died on active duty status in the Armed Forces of the United States.”<sup>232</sup> Noting “the sympathetic features” of the situation before it in *Matter of Varela*, the BIA nevertheless rejected the citizen’s petition on behalf of his wife given that he had died while the petition was still pending.<sup>233</sup> The BIA reasoned that “at the time of [the petition’s] decision the beneficiary was no longer the spouse of a United States citizen.”<sup>234</sup>

The 1990 Act changed immigration law’s understanding that death terminated marriage by preventing the death of the American spouse from inevitably defeating status; it even allowed certain widows and widowers<sup>235</sup> to obtain legal permanent resident status by filing a self-petition in cases where the spouse had not filed one while alive.<sup>236</sup> The self-petition was, however, strictly limited to: spouses of U.S. citizens who were married and had been married for at least two years at the time of death; who submitted the petition within two years of the death; and who had not re-married.<sup>237</sup>

In interpreting the two-year requirement imposed by the 1990 Act, federal courts addressed the larger question of whether death ended the relationship between the spouses.<sup>238</sup> The issue arose in cases deciding whether the 1990 Act’s two-year marriage requirement applied only to a self-petition filed by the surviving spouse, or also to a petition that had been filed by the citizen spouse

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230. See 12 Fed. Reg. 5127 (July 31, 1947) (“[T]he issuance of a visa will be withheld and approval of the petition may be revoked if it is ascertained that the petitioner has since lost his American citizenship, has died, or has become divorced from the beneficiary wife or husband . . . .”); see also Memorandum from Donald Neufeld et al., U.S. Citizenship & Immigration Servs., to Exec. Leadership 2 (Dec. 2, 2009) [hereinafter USCIS Interoffice Memorandum], available at <http://www.uscis.gov/sites/default/files/ilink/docView/AFM/DATAOBJECTS/APP21-8.pdf>.

231. 8 C.F.R. § 205.1(a)(3)(i)(c) (2006).

232. *Matter of Varela*, 13 I. & N. Dec. 453, 455 (B.I.A. 1970).

233. *Id.*

234. *Id.* at 454.

235. For the sake of brevity and consistency, this Article will refer to the remaining spouse in the female form “widow” given that it tracks the reality of most of decisions addressing the provision.

236. 8 U.S.C. § 1151(b)(2)(A)(i) (Supp. III 2006).

237. 8 U.S.C. § 1151(b)(2)(A)(i) (Supp. II 1988) (defining “immediate relative”).

238. See *Lockhart v. Napolitano*, 573 F.3d 251, 253 (6th Cir. 2009); *Neang Chea Taing v. Napolitano*, 567 F.3d 19, 21 (1st Cir. 2009); *Freeman v. Gonzales*, 444 F.3d 1031, 1032 (9th Cir. 2006); *Hanford v. Napolitano*, No. SA-08-CV-795-XR, 2009 WL 3073956, at \*1 (W.D. Tex. Sept. 18, 2009); *Hootkins v. Napolitano*, 645 F. Supp. 2d 856, 859 (C.D. Cal. 2009).

while alive. The First, Sixth and Ninth Circuits held that the amendment affected only a widow's self-petition and not the petition submitted by the U.S. citizen, thereby limiting the reach of the two-year marriage requirement.<sup>239</sup> The Ninth Circuit in *Freeman v. Gonzales*, reasoned that an immigrant widow retained her status as "spouse" under the immediate relative category, despite the intervening event of death—"Congress clearly intended an alien widow whose citizen spouse has filed the necessary forms *to be and to remain* an immediate relative (spouse) for purposes of [the statute]."<sup>240</sup> Similarly, in *Taing v. Napolitano*, the First Circuit affirmed the definition of spouse to include a "surviving spouse" and squarely rejected the government's argument that the term referred only to "a husband or wife within a legal marriage."<sup>241</sup>

In contrast, the Third Circuit interpreted the two-year marriage requirement to apply to both groups of spouses.<sup>242</sup> In *Robinson v. Napolitano*, the court reached its decision by relying in part on the "core purpose of the U.S. family-based immigration policy" which it defined as "the promotion of family unification for U.S. citizens and lawful permanent residents."<sup>243</sup> It admitted that no interpretation of the statute served to "promote unification of the marital unit,"<sup>244</sup> given that in both cases the American spouse had died. But unlike the Ninth Circuit, which had acknowledged the family relationship that continued even after the death of one of the spouses, the court in *Robinson* declared that defining the term spouse to include a surviving spouse would be "illogical and contrary to our understanding of the legal effect of death on a marriage," which "terminates the legal union."<sup>245</sup> Instead, it saw only competing concerns: "Congress created a balance between the goal of family unity and the legitimate expectations of an alien-spouse whose connections to the United States were likely to have become solidified during the two-year marriage period."<sup>246</sup> In so reasoning it elevated territorial ties over any familial ones that may have accrued during the marriage.<sup>247</sup> This was true even though the widow in the case, Mrs. Osserritta Robinson, had elsewhere described her deceased spouse as her "'best

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239. *Taing*, 567 F.3d at 28; *Lockhart*, 573 F.3d at 257; *Freeman*, 444 F.3d at 1042.

240. *Freeman*, 444 F.3d at 1039.

241. *Taing*, 567 F.3d at 25; *see also Lockhart*, 573 F.3d at 258 (concluding that the common, ordinary meaning of spouse includes a surviving spouse and thus supports the plain language reading of the statute).

242. *Robinson v. Napolitano*, 554 F.3d 358, 364 (3d Cir. 2009).

243. *Id.* at 367.

244. *Id.*

245. *Id.* at 366.

246. *Id.* at 367.

247. Immigration law frequently uses familial ties as a proxy for territorial ties, with problematic results. *See* Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J.L. & GENDER 405, 447–51 (2013) (explaining how the governments' concern over territorial ties obscured a concern over the strength of familial ties, in particular anxiety over the perceived strength of the father-child relationship).

friend,” continued to rely on her husband’s life insurance policy, and was raising a child who was three years old at the time of his stepfather’s death.<sup>248</sup>

Shortly after the decision in *Robinson*, Congress amended the 1990 Act to remove the two-year durational requirement for marriages in which the American spouse died.<sup>249</sup> The two-year requirement the Third Circuit had balanced against “family unity” disappeared, leaving only the family unit that experienced death, which Congress acknowledged in granting status. The Act also expanded the bases for granting a petition, including where the citizen spouse had died prior even to the immigrant’s arrival to the United States—that is, prior to any territorial ties being formed.<sup>250</sup>

In 2010, the USCIS issued a policy memorandum broadening the categories of petitioners for whom death would not defeat status.<sup>251</sup> They included the principal and derivative beneficiaries of a pending or approved family-based visa petition; the derivative beneficiaries of a pending or approved employment-based petition; the derivative beneficiaries of a petitioner admitted on a U-visa.<sup>252</sup> By recognizing the eventuality of death within the family, the INA expanded the types of petitioners that could seek status.

The INA also prevents the death of an American spouse from defeating an immigrant’s legal status in the fault-based context of battery.<sup>253</sup> The VAWA 2000 allowed “battered immigrants . . . to file their applications for immigration status within 2 years of the divorce, *death*, or loss of citizenship of the abuser” given the aforementioned effort to separate the battered foreign spouse’s status from the American batterer.<sup>254</sup> In the hearings before Congress, death was easily recognized within an immigration system that already accepted it in the context

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248. See Kirk Semple, *Losing a Partner, Losing a Foothold*, N.Y. TIMES, Feb. 2, 2009, at A15.

249. Pub. L. No. 111-83, 123 Stat. 2186 (2009).

250. USCIS Interoffice Memorandum, *supra* note 230, at 3. Familial ties explicitly trumped any territorial ties.

251. U.S. Citizenship and Immigration Servs. Policy Memorandum regarding Approval of Petition and Applications after the Death of the Qualifying Relative under New Section 204(1) of the Immigration and Nationality Act 1 (Dec. 16, 2010), <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/January/Death-of-Qualifying-Relative.pdf>.

252. See *id.* at 1–2 (outlining other categories as long as the petitioner resided in the United States when the qualifying relative died and continued to do so when the decision on the pending petition is issued).

253. *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigration and Claims of the Comm. on the H. Judiciary*, 106th Cong. 34 (2000) (statement of Rep. Janice Schakowsky).

254. *Id.* (emphasis added); see also *id.* at 53 (“To sever some of the control U.S. citizens have over the lives and immigration status of their spouses and children . . . even after VAWA, battered immigrant women need to have the ability to file a VAWA self-petition, for at least a limited time, following divorce, the abuser’s loss of status or death.”) (statement of Jacqueline Rishty, Att’y with Catholic Charities Immigration Legal Services). The VAWA 2000 was the first act to recognize that death would not defeat a self-petitioner’s application in this context. 8 U.S.C. § 1154(a)(1)(A)(iii)(II) (2000); H.R. REP. NO. 106-939, at 112 (2000) (Conf. Rep.).

of marriage—as a result, allowing death not to defeat status in the case of domestic violence “would not be anomalous in immigration law.”<sup>255</sup>

Even in the absence of an explicit Congressional directive, courts have held that the death of the American spouse does not necessarily terminate status.<sup>256</sup> The IMFA does not directly address the question of whether a K-1 fiancé visa holder can remain in the United States if the American spouse dies after the marriage has taken place but before adjusting status.<sup>257</sup> The regulations only specify that the fiancé visa will be “automatically terminated when the petitioner dies . . . before the beneficiary arrives in the United States.”<sup>258</sup> But at least two district courts have held that death after a bona fide marriage does not revoke status.<sup>259</sup> The courts’ reasoning relies on an understanding that the marital relationship does not end upon the death of a spouse. Considering the death of the U.S. citizen spouse after marriage, but prior to the foreign spouse’s receipt of permanent resident status, the district court in *Hanford v. Napolitano* allowed the petitioner to adjust status.<sup>260</sup> Unlike the Third Circuit in *Robinson*, the *Hanford* court held that the marriage continued to provide the basis for status, despite the husband’s intervening death.<sup>261</sup> The court in *Hootkins v. Napolitano* relied on a more direct analogy—death, like divorce, does not render a bona fide marriage automatically invalid for purposes of adjustment.<sup>262</sup>

Indeed, petitioning for status where the American spouse has died mirrors petitioning for status where a divorce has taken place, in that both depend on the validity of the marriage.<sup>263</sup> Death is also similar to divorce in that neither inevitably ends immigration status for the remaining family members.<sup>264</sup>

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255. *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigration and Claims of the Comm. on the H. Judiciary*, 106th Cong. 53–54 (2000) (statement of Jacqueline Rishy, Att’y with Catholic Charities Immigration Legal Services).

256. *See Hootkins v. Napolitano*, 645 F. Supp. 2d 856, 870 (C.D. Cal. 2009); *Hanford v. Napolitano*, No. SA-08-CV-795-XR, 2009 WL 3073956, at \*6 (W.D. Tex. Sept. 18, 2009).

257. The statute enables adjustment of status on the basis of “the marriage of the nonimmigrant . . . to the citizen who filed the petition . . .” 8 U.S.C. § 1255(d) (2012). Death before the marriage had taken place leaves the foreign fiancé in a weakened position. *See Caddali v. INS*, 975 F.2d 1428, 1430 (9th Cir. 1992) (holding that foreign fiancée was inadmissible upon entry where her petitioner fiancé had died prior to her arrival); *see also* discussion *infra* Part III.A.

258. 8 C.F.R. § 214.2(k)(5) (2013).

259. *See Hootkins*, 645 F. Supp. 2d at 870; *Hanford*, 2009 WL 3073956, at \*6.

260. *Hanford*, 2009 WL 3073956, at \*5 (noting that “Ms. Hanford is seeking to adjust her status as a result of her marriage to Steven Allan Sanford, the U.S. citizen who petitioned the government to obtain her K-1 visa”).

261. *Id.*

262. *Hootkins*, 645 F. Supp. 2d at 869–70 (analogizing the death to the divorce addressed in *Choin v. Mukasey*, 537 F.3d 1116, 1121 (9th Cir. 2008)).

263. *See* 8 C.F.R. § 204.2(b)(2) (2014) (petitioner must prove marriage was legally valid; not legally terminated; and deceased spouse was citizen at the time of death).

264. *See* 8 U.S.C. § 1151(b)(2)(A)(i) (2012) (allowing for a self-petition for an alien, and each child of the alien, whose citizen spouse passes away).

Family-based immigration unquestionably recognizes a changing family, be it by choice or by chance.

#### IV. THE LIMITS OF IMMIGRATION LAW'S FAMILY-BASED PROVISIONS

This Article has proposed that immigration law's family-based provisions do more than merely unify intact families separated by geography.<sup>265</sup> It has identified instances where families experience moments of rupture and where immigration law accommodates those moments in granting status.<sup>266</sup> Given, however, that families experience and immigration law recognizes something other than strict unity, two additional interactions must be analyzed—where immigration law recognizes only an intact family relationship in granting status but the relationship experiences some form of rupture, and where immigration law does not recognize a relationship, that is intact, notably that of marriage.

This Part considers these two scenarios in turn. It first explores the limits of immigration law's recognition of family relationships that change by looking to where immigration law accepts only an intact family in granting status, which is the baseline set by the Hart-Celler Act. It follows by identifying the limits of immigration law's promotion of family unification by considering where immigration law does not allow marriage to an American citizen to confer status, or where marriage defeats status, thereby affecting the shape the relationship can take. The principal aim is to establish the bounds of immigration law's treatment of the American family; accordingly, the potential justifications offered for the differing rules are at least at this juncture, of little relevance.

##### *A. Immigration Law Burdens Divorce, Separation, and Death*

This Article has catalogued the underappreciated ways that immigration law accommodates a flexible family.<sup>267</sup> Yet, in light of the statutory structure that prioritizes an intact family unit, these moments remain exceptions to the rule. This section identifies where immigration law disfavors divorce, separation, and death—in both marital and non-marital contexts—in granting immigration status.

The moments of dis-unity that a relationship can experience are, of course, much broader than the moments immigration law recognizes: the Hart-Celler Act establishes unity as the baseline, given its express aim of granting status to family relationships composed of spouses, parents and children.<sup>268</sup> Accordingly,

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265. See discussion *supra* Part II.

266. See discussion *supra* Part III.

267. See discussion *supra* Part IV.

268. Hart-Celler Act, Pub. L. No. 89-236, sec. 1, § 201(b), 79 Stat. 911 (1965) (defining “immediate relatives” to be “the children, spouses, and parents of a citizen of the United States”);



immigration law does not always accommodate situations where a couple seeks both status and a separation or divorce within a marital relationship, in light of the burdens and preferences set out in the rules. By its very design the immigration regime also fails to account for any dis-unity that takes place in a relationship that is not marital; the only deviation from that rule occurs in the context of domestic violence.<sup>269</sup>

Take immigration law's treatment of divorce. While divorce does not necessarily defeat status, it is clearly articulated as an exception to granting status.<sup>270</sup> Once a marriage "has been judicially annulled or terminated," the INA instructs the Secretary of Homeland Security to also "terminate the permanent resident status of the alien (or aliens) involved as of the date of determination."<sup>271</sup> The statute thus clearly establishes that ending the marriage ends immigration status. Only then does the provision provide a series of separate "hardship" waivers for divorce or annulment, or battery or extreme cruelty, if the marriage was entered into in good faith.<sup>272</sup> The effect of the divorce is to place the good faith nature of the marriage into question, and shift the burden of proving its validity from the government to the petitioner.<sup>273</sup>

The immigration rules similarly disfavor a non-legal separation within marriage.<sup>274</sup> The provisions limit the availability of waivers to instances where a finalized divorce, or battery, has taken place; the only other option for adjusting status at the end of the conditional residency period is to submit a joint-petition.<sup>275</sup> Depending on the nature of the relationship, this option can make choosing to separate more complicated: submitting a joint petition may be difficult where marital troubles have led to a separation.<sup>276</sup> The immigrant who

Hart-Celler Act § 203(a), 79 Stat. at 913 (outlining the preference categories to include "spouses, unmarried sons or daughters of an alien lawfully admitted for permanent residence").

269. See discussion *supra* Part III.B.2.

270. See Olivares, *supra* note 172, at 173–83 (discussing the barriers to divorce erected by the immigration law provisions).

271. 8 U.S.C. § 1186a(b)(1)(A)–(B) (2012).

272. And the petitioner can prove "extreme hardship" upon removal. 8 U.S.C. § 1186a(c)(4)(A)–(C) (2013).

273. 8 C.F.R. § 1216.5(e)(1) (2014). See *Alvarado de Rodriguez v. Holder*, 585 F.3d 227, 230 (5th Cir. 2009) ("In order to qualify for a hardship waiver under the 'good faith' prong, Alvarado had to prove that her marriage was entered into in good faith and that she was not at fault in failing to meet the statutory condition."); *In re Kwabena Acheampong*, 2009 WL 3063667, at \*1 (B.I.A. 2009) (citations omitted) ("The burden of proof is on the respondent to prove that his marriage was entered into in good faith.").

274. Another way to understand the provisions is as setting up a viability determination by proxy. See discussion *supra* Part III.B.1.

275. 8 C.F.R. § 1216.4(a).

276. See Beth Stickney, *The Immigration Consequences of Divorce*, 13 J. AM. ACAD. MATRIM. LAW 271, 289 (1996) ("[A] concern . . . is just how strong is the friendship between the couple. . . . If, between the time the couple files the joint petition and the time the INS adjudicates the petition, the amicable relationship between the parties sours, the United States citizen could wreak havoc for the conditional resident.").

wants to adjust status therefore has two choices: he or she can submit a joint-petition despite marital difficulties, or obtain a divorce in order to submit a self-petition. Given these options, the immigrant may decide to: separate and attempt to submit a joint petition; stay in the problematic marriage until the end of the two-year period to ensure satisfaction of the joint-petitioning requirement; or, in what would be a perverse result given immigration law's emphasis on marriage, decide to divorce given the administratively simpler option of self-petitioning. The immigration rules, therefore, complicate and potentially disfavor separating where status is the desired result.

If the couple is not yet married, the rules do not acknowledge any possibility of dis-unity, unless domestic violence is involved. This is the case even where the immigrant and the American citizen are on the path to marriage, as in the situation of a nonimmigrant K-1 visa holder who separates from his or her American fiancé.<sup>277</sup> Once a fiancé is admitted to the United States, any separation before the marriage defeats status.<sup>278</sup> To retain status, the foreign fiancé must "conclude a valid marriage with the petitioner within ninety days after admission."<sup>279</sup> Courts have held that adjustment is unavailable by other means: a foreigner who had "neither married her fiancé within 90 days . . . nor departed" is clearly "removable."<sup>280</sup>

In the fiancé visa context, the IMFA actually put an end to recognizing a type of dis-unity, and subsequent unity, that the BIA had previously allowed. Currently, a K-1 visa beneficiary must adjust on the basis of a marriage to the American citizen who sponsored the original petition.<sup>281</sup> Prior to the passage of the IMFA, however, the BIA permitted a nonimmigrant fiancé to adjust status on the basis of a marriage to an American citizen other than the original petitioner.<sup>282</sup> In reaching that decision, the BIA held that the main requirement was that the fiancé had entered the United States "intending in good faith to marry the citizen petitioner."<sup>283</sup> The BIA found as much in *Matter of Zampetis*, reasoning that the fiancé "at all times intended to marry his fiancée petitioner; [] the latter had an honest change of mind; and [the] applicant's present marriage is

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277. 8 U.S.C. § 1101(a)(15)(K)(ii) (2012).

278. *Id.* § 1184(d)(1).

279. *Id.* § 1101(a)(15)(K)(i).

280. *Kalal v. Gonzales*, 402 F.3d 948, 951 (9th Cir. 2005) (citing 8 U.S.C. § 1184(d)); *see also* *Caraballo-Tavera v. Holder*, 683 F.3d 49, 53 (2d Cir. 2012) (per curiam) (holding that beneficiary of a K-1 visa "cannot adjust his status to that of a full LPR on any basis other than marriage to his original K-1 visa sponsor").

281. 8 U.S.C. § 1255(d) (2012).

282. *Matter of Zampetis*, 14 I. & N. Dec. 125, 125 (B.I.A. 1972), *superseded by statute*, Immigration Fraud Amendments Act of 1986, Pub. L. No. 99-639, 100 Stat. 3537, *as recognized in* *Markovski v. Gonzales*, 486 F.3d 108, 241 (4th Cir. 2007).

283. *Id.*

a stable one.”<sup>284</sup> Thus, where “the [American citizen] filed the petition in good faith but subsequently had an honest change of mind and did not marry the alien,” that “honest change of mind” was insufficient to defeat status.<sup>285</sup> The BIA acknowledged both the decision to separate from the intended spouse and the decision to marry another U.S. citizen.<sup>286</sup> Its acceptance of the initial separation led to its recognition of the ensuing marriage.<sup>287</sup>

The death of the American partner in a non-marital relationship is also fatal to an immigrant’s request for status. While courts have acknowledged that death after marriage does not defeat adjustment,<sup>288</sup> such reasoning has not been applied where the marriage has yet to take place. In *Caddali v. INS*, the Ninth Circuit considered the situation of a fiancée who arrived to the United States only to discover that her future husband had been murdered a few days prior to her arrival.<sup>289</sup> Despite possessing a visa admitting her to the United States, the court reasoned “what is determinative is . . . the nonexistence of her status as a fiancée at the time of entry.”<sup>290</sup> The court interpreted any non-marital relationship the couple may have had to end upon the American citizen’s death. Absent allegations of domestic violence, immigration law ignores dis-unity by chance in a relationship that does not bear the legal stamp of marriage.

Death or divorce may defeat status in one final circumstance—where the individual is a derivative beneficiary of a principal visa holder. In this case, the derivative beneficiary is dependent on the status of the principal beneficiary; as such, the death of the principal beneficiary may also mark the end of the derivative beneficiary’s status.<sup>291</sup> While divorce does not necessarily affect all derivative beneficiaries,<sup>292</sup> it does impact those who are admitted as the spouses

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284. *Id.* The decision is based on the American petitioner changing his mind, rather than the foreign soon-to-be-spouse. *Id.* There is no indication, however, that the holding was based on this fact in any material way, although this fact may very well have mattered in considering the equities.

285. *Id.*

286. *Id.*

287. *Id.* at 126.

288. See discussion *supra* Part III.C.

289. *Caddali v. INS*, 975 F.2d 1428, 1429 (9th Cir. 1992).

290. *Id.* at 1430.

291. See *Matter of Khan*, 14 I. & N. Dec. 122, 124 (B.I.A. 1972) (holding that death of principal beneficiary of a visa as a brother of a U.S. citizen defeated the derivative beneficiary’s immigration status as his son because “[t]he issuance of an immigrant visa to a spouse or child under section 203(a)(9) is dependent upon the existence of the immigrant status of the principal alien”); *Matter of Naulu*, 19 I. & N. Dec. 351, 352 n.1, 353 (B.I.A. 1986) (noting that “the right of a derivative beneficiary to permanent resident status is wholly dependent upon that of the principal alien” and that “[t]he relationship between the principal alien and the derivative beneficiary must exist” prior to adjusting status and at the time the derivative beneficiary seeks entry or adjustment). It is possible, however, that USCIS’s 2010 policy memorandum expanding the petitioning categories upon the death of the qualifying relative, see discussion *supra* accompanying notes 252–53, would, under certain circumstances, prevent this loss of status.

292. “Even though the likelihood of immigration complications for a divorcing derivate spouse is small, if the facts reveal that the couple married shortly before the principal immigrant was due to

of nonimmigrants; they are recognized only by virtue of their marital relationship to the principal nonimmigrant.<sup>293</sup> Upon divorce, the derivative nonimmigrant loses status automatically and without exception.

The weaker the recognition of family ties because they fall outside of marriage, or the weaker the immigration status of the beneficiary, the more limited immigration law's recognition of different types of dis-unity will be. More surprising perhaps is that the weaker the recognition granted to potential forms of *dis*-unity, as evidenced by the IMFA's refusal to allow a K-1 fiancé visa holder to separate, then the weaker the recognition of potential unity, in the form of marriage. Indeed, the U-visa, which is most solicitous of different types of dis-unity and legal statuses, also provides a glimpse into the broadest forms of family unity and types of family units that immigration law informally accepts.

### *B. Immigration Law Burdens Marriage*

The general set of circumstances where immigration law does not recognize different types of families in granting status has been examined in-depth by other legal scholarship.<sup>294</sup> What has been less developed is how immigration provisions burden the marital union. Accordingly, this section focuses on the ways that the marital relationship itself is disfavored by an immigration system that is otherwise designed to recognize and prioritize it.<sup>295</sup>

immigrate, and the parties have separated relatively soon after arriving in the United States, the divorce attorney should at least warn the derivative spouse of the potential for the INS to suspect marriage fraud." See Stickney, *supra* note 276, at 309 (explaining the immigration-related consequences of divorce for derivative immigrant spouses and children).

293. A nonimmigrant includes anyone who is admitted to the United States for a specific purpose and for a temporary period of time; nonimmigrant status includes students, tourists, and exchange visitors. See ALENIKOFF, *supra* note 26, at 396–97.

294. See, e.g., Feinberg, *supra* note 5, at 651–52 (arguing for a "plus one policy" of family reunification to enable sponsors to elect to bring an individual to the United States that would not be recognized by current immigration law categories); Bernard Freidland & Valerie Epps, *The Changing Family and the U.S. Immigration Laws: The Impact of Medical Reproductive Technology on the Immigration and Nationality Act's Definition of the Family*, 11 GEO. IMMIGR. L.J. 429, 433 (1997)) (arguing that the INA provides little guidance as to what constitutes the family it is uniting and proposing a unified definition of family based on interpersonal rather than biological relationships); King, *supra* note 5 (arguing that American immigration law is premised on a biological definition of the family and should move toward a more functional definition of the family in order to satisfy the caretaking needs of children); Victoria Degtyareva, Note, *Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent*, 120 YALE L.J. 862, 864–66 (2011) (citing Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952); Holland, *supra* note 5 (arguing that immigration law should accommodate more non-traditional family models currently recognized by family law).

295. There is, of course, a much more fundamental way in which the immigration system does not recognize unity, and that is by not recognizing relationships that fall outside of a marital union, or that fall outside of what the law recognizes as a marital union. A marriage is recognized by the INA when it "was entered into in accordance with the laws of the place where the marriage took place." 8 U.S.C. § 1186a(d)(1)(A)(i)(I) (2012). This excludes relationships that are not marital

In establishing rules allowing marriage to serve as a basis for granting status, the IMFA did not recognize all marital relationships.<sup>296</sup> Instead, citing concerns over fraud, it erected barriers that prevented certain marriages from providing status.<sup>297</sup> One of the IMFA's most controversial provisions was Section 5, which imposed a two-year foreign residency requirement on an immigrant spouse who married an American citizen during deportation proceedings, and a two-year durational requirement on the marriage itself.<sup>298</sup> A direct consequence of Section 5 was that all marriages between Americans and immigrants involved in deportation proceedings—including marriages determined to be bona fide—were incapable of granting the immigrant status prior to the termination of a two-year period.<sup>299</sup>

Section 5 affected not only the immigration status of the foreign spouse but, significantly, the form the marital relationship could take: either both parties to the marital unit had to leave the United States, or the couple had to live apart for a period of two years.<sup>300</sup> Congress voiced concerns over the results of such a rule, with a particular emphasis on the consequences to the American citizen, who was

placed in the situation of having to choose between his or her country, career, and other family on the one hand and moving away to a foreign land where he or she may not know the language and customs or be able to work for a 2-year period on the other in order to live with the new spouse.<sup>301</sup>

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unions; it also excludes marital unions that are not recognized by the laws of where the marriage took place. Until recently, there was the additional barrier of the federal government not recognizing same-sex marriages. See Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Couples in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 601–05 (2010) (providing a guide for how immigration law could address same-sex marriage in the event that DOMA was repealed). The various forms of family unity that could be recognized outside of marriage are not the subject of this section.

296. See, e.g., Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (noting that those who obtain their immigrant statuses based on a marriage of less than two years can only receive conditional status).

297. See *id.*

298. *Id.* at § 5. The rule “[p]revent[ed] aliens undergoing immigration status related proceedings from obtaining an immigration benefit on the basis of a marriage entered into during the pendency of such proceedings unless the alien remain[ed] married for two years and live[d] outside the U.S. for two years.” H.R. REP. NO. 99-909, at 8 (1986).

299. There was no requirement that the marriage be proven fraudulent in order for the two-fold two-year requirement to apply. See 134 CONG. REC. S1625 at 2682 (daily ed. Feb. 29, 1988) (“[I]n trying to ferret out those who abuse our marriage-related immigration laws, recent news indicates we may have gone too far and are now infringing on the rights of those U.S. citizens and alien spouses who marry out of true love and respect for each other.”) (statement of Sen. Simon).

300. See *id.*

301. *Id.*

One of only two opinions to strike down Section 5, *Manwani v. DOJ*, also addressed the burden placed on the marital relationship “at [its] most crucial and vulnerable stage”: “A forced estrangement will precipitate enormous strains at any time, but at the beginning of a marriage, it may be fatal.”<sup>302</sup>

Section 5 thus prevented marriages from taking place in the United States for a period of two years; this was true even where, as the district court in *Manwani* noted, “the couple may have an established home life, be raising a child and be, in every respect, a familial entity that our society—including our immigration laws—seeks to encourage and protect.”<sup>303</sup> Moreover, the marital relationship was uniquely burdened. Parents, children and siblings could still file petitions on behalf of their relatives who were in deportation proceedings, as could employers for their employees.<sup>304</sup>

Although the majority of courts upheld the provision in the face of constitutional due process and equal protection challenges,<sup>305</sup> Congress created an exception to the two-year foreign-residency requirement for bona fide marriages in the 1990 Act.<sup>306</sup> Despite this amendment, the rule’s original formulation continues to be very much alive: the once “absolute bar” guides the BIA’s strict interpretation, which presumes that all marriages entered into during deportation proceedings are fraudulent.<sup>307</sup> The amended rule also imposes a high

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302. *Id.* at 1384 (holding that section 5 was both a violation of due process and equal protection); *see also* *Escobar v. INS*, 896 F.2d 564, 573 (D.C. Cir. 1990) (holding that section 5 violated the Due Process Clause), *appeal dismissed en banc*, 925 F.2d 488 (D.C. Cir. 1991). These were the only two reported cases finding that section 5 of the IMFA was unconstitutional. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1660–64 (1992) (quoting *Azizi v. Thornburgh*, 908 F.2d 1130, 1138 (2d Cir. 1990) (Cardamone, J., dissenting)); *Escobar*, 896 F.2d at 571–72) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Anetekhai v. INS*, 876 F.2d 1218 (5th Cir. 1989)) (discussing the two cases in the context of arguing that due process considerations serve as “surrogate” substantive judicial review in the face of the plenary power doctrine).

303. *Manwani v. Dept. of Justice*, 736 F. Supp. 1367, 1385 (W.D.N.C. 1990). The American citizen in the case, Mrs. Manwani, had “to choose between her right to marital association and her right to continue her residency in this country.” *Id.* at 1381.

304. *See* 8 C.F.R. § 204.1; *id.* § 214.2(h); *see also* *Manwani*, 736 F. Supp. at 1388 (relying on the language from the C.F.R.).

305. *See, e.g.*, *Bright v. Parra*, 919 F.2d 31, 33 (5th Cir. 1990) (“the United States citizen spouse has no constitutional right to keep her alien spouse from being deported.”); *Azizi v. Thornburgh*, 908 F.2d 1130, 1136 (2d Cir. 1990) (holding that Section 5 “is an exercise of Congress’ broad power to enact substantive legislation, classifying the groups of aliens who qualify for immediate relative status.”); *Alamario v. Attorney Gen.*, 872 F.2d 147, 151–53 (6th Cir. 1989) (“Because Congress could legitimately associate the incidence of marriage fraud with aliens facing deportation more so than with aliens who were not, it was not unconstitutional to classify alien marriages based on the status of the alien at the time of the marriage.”).

306. Immigration Act of 1990, Pub. L. No. 101-649, § 702(a)(3), 104 Stat. 5086; 8 U.S.C. § 1255(e)(3) (Supp. II 1998).

307. *See* *Matter of Arthur*, 20 I. & N. Dec. 475, 478–79 (B.I.A. 1992) *modified on other grounds*, *In re Velarde-Pacheco*, 23 I. & N. Dec. 253 (B.I.A. 2002) (“By first enacting an absolute bar to adjustment of status based upon a marriage entered into during the pendency of

burden of proof: the petitioner must prove by “clear and convincing evidence” that the marriage is bona fide.<sup>308</sup> Given the heavy burden, marriages entered into during deportation proceedings still fail to grant status.<sup>309</sup> While this may be the result of a determination that the marriage is not bona fide, the BIA has concluded in a number of cases that “the record does not demonstrate that the petitioner met his burden of establishing a bona fide marital relationship by clear and convincing evidence,” but “the denial is based solely on a failure to meet the burden of proof.”<sup>310</sup> Although these denials allow a petitioner to re-apply with additional evidence, the high standard of proof places a weighty obstacle on the marriage’s ability to prevent the immigrant spouse’s deportation.<sup>311</sup>

Thus, while a blanket foreign-residency requirement is no longer imposed on marriages entered into during deportation proceedings, the immigration provisions continue to prevent married couples from either living together or living together in the United States. In particular, the immigration rules may continue to force the American citizen to choose between living with his or her spouse abroad or remaining in the United States alone.

The VAWA self-petitioning provisions are also currently understood to place an absolute bar on marriage, in the form of remarriage, where it occurs prior to filing for status.<sup>312</sup> The VAWA 2000 allows an immigrant to file a self-petition on the basis of spousal abuse after a divorce<sup>313</sup> and to remarry after filing a petition.<sup>314</sup> It is silent, however, as to whether remarriage prior to filing a

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proceedings . . . unless the marriage first survived a 2-year separation, and then by requiring a substantially heightened showing to establish the bona fides of the marriage, Congress rather clearly created a presumption that marriages contracted after the institution of exclusion or deportation proceedings are fraudulent.” ); *see also* *Malilia v. Holder*, 632 F.3d 598, 605 (9th Cir. 2011) (beginning from the premise that “Congress first enacted an absolute bar to adjustment of status based on a marriage entered into during removal proceedings, and then enacted an exception to this bar with a heightened evidentiary burden to establish the bona fides of the marriage”).

308. 8 U.S.C. § 1255(e)(3) (2012).

309. *See, e.g.*, *Yepremyan v. Holder*, 614 F.3d 1042, 1045 (9th Cir. 2010) (holding that a certificate of marriage and two affidavits did not constitute clear and convincing evidence that marriage was bona fide); *Vega v. Attorney Gen.*, 261 F. App’x 415 (3d Cir. 2009) (affirming that evidence submitted was insufficient to prove marriage was bona fide by clear and convincing evidence and affirmed denial of BIA to consider additional evidence).

310. *In re Agnes Wachuka Makwaka*, No. A087-075-122, 2009 WL 3817955, at \*1 (B.I.A. 2009). In dismissing the appeal, the BIA notes that petitioner can appeal again and include more evidence. *See id.*; *In re Falalo Touray*, No. A087-193-578, 2009 WL 2218095, at \*1 (B.I.A. 2009); *In re Dorel Marcel Barnut*, No. A077-393-321, 2008 WL 5181769, at \*2 (B.I.A. 2008).

311. As evidenced in part by the necessity to re-apply with additional support. *See In re Agnes Wachuka Makwaka*, 2009 WL 3817955, at \*1 (noting that petitioner must provide competent evidence that marriage was not fraudulent); *In re Falalo Touray*, 2009 WL 2218095, at \*1 (noting the same); *In re Dorel Macrel Barnut*, 2008 WL 5181769, at \*2 (noting the same).

312. 8 C.F.R. § 204.2(c)(1)(ii).

313. H.R. REP. NO. 106-939, at 112 (2000) (Conf. Rep.).

314. *See id.* at 114 (clarifying “that remarriage has no effect on pending VAWA immigration petition”).

petition terminates status. The implementing regulations have interpreted the silence to mean that remarriage defeats the self-petition.<sup>315</sup> Until the petition is filed, the regulations place the decision to marry at odds with the decision to attain immigration status. While a petitioner who decides to marry and forego the ability to self-petition may eventually achieve status through the new marriage—depending on various factors including the immigration status of the new spouse and of the immigrant—the immigration laws do not recognize, and in some cases burden, the only union between unrelated adults that the system on the whole seeks to promote.

An even longer bar to remarriage exists in the context of a petition filed by a widow.<sup>316</sup> Where an immigrant spouse petitions to adjust status after the American spouse's death, the rules impose a period of non-marriage that lasts throughout the petitioning period.<sup>317</sup> Current case law differentiates between a self-petition and a petition originally filed by the American spouse.<sup>318</sup> While remarriage does not defeat the latter, it does defeat the former.<sup>319</sup> Accordingly, though death does not automatically defeat status, remarriage after it occurs does—the INA considers the application of the foreign widow or widower only “until the date the spouse remarries.”<sup>320</sup>

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315. See Petition for Immigrant Abused Spouse, No. EAC 08 101 50746, 2009 WL 4981914, at \*5 (A.A.O. Aug. 3, 2009) (concluding “Congress wished for aliens with pending petitions to be either still married to the abusive spouse, or divorced within the last two years but not married to another person at the time of filing”); see also [Name redacted], No. EAC 04 069 53268, 2005 WL 2159690, at \* 2 (B.I.A. 2005) (affirming “petitioner’s remarriage to one other than her abusive spouse prior to the filing of the petition is a bar to granting the petition”). It is important to note that there are instances where the regulations conflict with the statute, given that they have not been updated since the passage of VAWA 2000. See Lauri J. Owen, *Forced through the Cracks: Deprivation of Violence Against Women Act’s Immigration Relief in San Francisco Bay Area Immigrant Domestic Violence Survivors’ Cases*, 21 BERKELEY J. GENDER L. & JUST. 13 (2006) (specifying the discrepancies between the text of VAWA 2000 and the regulations, noting that the practical result is to deny relief to immigrants that merit it under the statute).

316. 8 U.S.C. § 1151(b)(2)(A)(i) (Supp. III 2006). There may be reasons for this difference—for instance, the status of widows depends on the initial marital relationship while the status of VAWA petitioners does not—but this section focuses on disclosing instances where the marital relationship is burdened, rather than suggest possible rationales for those burdens.

317. See Pub. L. No. 111-83, 123 Stat. 2142, 2187 (2009) (banning remarriage under section 1151 eligibility); U.S. Citizenship and Immigration Servs. Policy Memorandum regarding Approval of Petition and Applications after the Death of the Qualifying Relative under New Section 204(1) of the Immigration and Nationality Act 1–2 (Dec. 16, 2010), <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/January/Death-of-Qualifying-Relative.pdf> (“A widow(er)’s eligibility for adjustment ends if the widow(er) remarries before obtaining LPR status.”).

318. *Williams v. Sec’y, U.S. Dep’t of Homeland Sec.*, 741 F.3d 1228, 1235–36 (11th Cir. 2014) (citations omitted).

319. See *id.* (reasoning that the remarriage bar in the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i) applies only to a self-petition and so “that a spouse eventually remarries does nothing to impugn the validity of the original I-130 beneficiary-petition or the first marriage”).

320. 8 U.S.C. § 1151(b)(2)(A)(i) (2009).



Entering a marriage for the first time sometimes fares no better for purposes of granting status. As previously discussed, where the original petition was for a K-1 fiancé visa, the IMFA specifies that a fiancé may not adjust status on the basis of a marriage to anyone other than “to the citizen who filed the petition to accord that alien’s nonimmigrant status.”<sup>321</sup> Courts, along with the BIA, interpret the statute to allow adjustment of status only where the marriage was to the initial K-1 sponsor.<sup>322</sup> Thus, marrying a U.S. citizen different from the original sponsor renders the foreign spouse deportable.<sup>323</sup> If the couple decides to marry nevertheless, preventing the marriage from granting status means that the couple cannot live together lawfully in the United States.

The immigration rules thus impact, and in many instances disfavor, a couple’s decision to enter into a marital union. Although some of these restrictions are temporary, they have the effect of interfering with the couple’s decision to marry while the immigrant seeks legal status. They also render the ability of an American citizen to marry dependent on the administration of the immigration system. The rules directly affect the form the relationship can take by preventing the marriage at the outset; preventing the married couple from living together; or precipitating the marriage’s dissolution if the couple cannot in fact live together.

The burden that immigration law places on marriages is crystallized in the case of “sham” divorces. While “sham” marriages are Congress’s primary concern,<sup>324</sup> “sham” divorces occur where the marital relationship defeats status by definition.

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321. *Id.* § 1255(d). See *supra* notes 283–86 and accompanying text.

322. See, e.g., *Caraballo-Tavera v. Holder*, 683 F.3d 49, 53 (2d Cir. 2012) (affirming that a K-1 visa holder can only adjust status on the basis of the marriage to K-1 visa sponsor in holding that petitioner could not adjust based on his daughter’s immigrant visa petition given his initial admission based on a K-1 visa); *Zhang v. Holder*, F. App’x 879, 885–86 (10th Cir. 2010) (finding petitioner deportable because he failed to marry his fiancée); *Markovski v. Gonzales*, 486 F.3d 108, 110–11 (4th Cir. 2007) (holding that petitioner admitted on a K-1 visa cannot adjust status on the basis of an employment petition); *Matter of Sesay*, 25 I. & N. Dec. at 437–38 (noting that IMFA provides that an immigrant on a fiancé visa can only adjust on the basis of marriage to the original fiancé petitioner).

323. *Kalal v. Gonzales*, 402 F.3d 948, 951 (9th Cir. 2005) (reasoning that despite petitioner’s marriage to a U.S. citizen other than her original sponsor and her new petition based on that marriage she “was in the position of a K-1 visa holder who neither married her fiancé within 90 days of entry, nor departed”). While part of the holding rests on the fact that the marriage took place outside of the ninety day allotted period, the strict interpretation of Section 1255(d) makes it highly unlikely that marriage to another U.S. citizen within the 90-day period would change the determination. *Id.* at 952 (noting that if the immigrant’s argument was permitted, she would be able to avoid the restrictive, carefully crafted scheme that Congress created to avoid marriage fraud); see also *Birdsong v. Holder*, 541 F.3d 957, 961 (8th Cir. 2011) (reasoning that a K-1 visa holder is barred “from adjusting her status on any basis other than her marriage to the U.S. citizen who petitioned on her behalf,” given Congress’s intent to prevent marriage fraud).

324. See 8 U.S.C. § 1325(c) (2012) (providing consequences of entering into fraudulent marriage).

The very existence of these divorces illustrates immigration law's effect on the marital union. One such situation arises where a legal permanent resident seeks to petition for a child under the unmarried child preference category.<sup>325</sup> Unlike U.S. citizens, legal permanent residents are only permitted to sponsor children who are unmarried.<sup>326</sup> In *Matter of Aldecoaotalora*, the married daughter of a legal permanent resident obtained a divorce in order to qualify for her mother's petition.<sup>327</sup> The daughter was married to a citizen of Spain with whom she had two children; both children were United States citizens.<sup>328</sup> After five years of marriage, and a few days after the birth of their second child, she sought a divorce.<sup>329</sup> Even though the daughter testified that the divorce was based on "irreconcilable differences," the record contained evidence that she still lived with her ex-husband, they filed joint tax returns, and they owned joint property.<sup>330</sup> Eventually, the beneficiary conceded that she had sought a divorce in order to obtain a green card; she explained that going to the United States was the only way her children could remain in America.<sup>331</sup>

The case of *Matter of Aldecoaotalora* presents a particularly stark example of how immigration law can impact the marital relationship. It also exposes some of the limits to the family unity that the rules seek to promote. The beneficiary admitted getting a divorce from her husband in order to gain entry into the United States to be with her family—her U.S. citizen sons and her legal permanent resident mother.<sup>332</sup> The immigration laws required her to be unmarried to do so.<sup>333</sup> Yet even this legal separation was insufficient: the BIA denied her petition, given that her "sole intention in seeking a divorce was to obtain immigration benefits."<sup>334</sup> Its reasoning was based on the specific unity Congress meant to promote in that provision—"she is clearly attempting to thwart the statutory purpose of the Act to unite unmarried children with their lawful permanent resident parents"<sup>335</sup>—without addressing the subsequent

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325. See *Matter of Aldecoaotalora*, 18 I. & N. Dec. 430, 430 (B.I.A. 1983); *Bazzi v. Holder*, 746 F.3d 640, 640 (6th Cir. 2013).

326. 8 U.S.C. § 1153(a)(2). U.S. citizens are able to petition for both their unmarried and married children, albeit at different preference levels. *Id.* § 1153(a)(1) (first preference for unmarried children of U.S. citizens); *id.* at § 1153(a)(3) (third preference category for married children of U.S. citizens).

327. *Matter of Aldecoaotalora*, 18 I. & N. Dec. at 431.

328. *Id.* at 430.

329. *Id.*

330. *Id.* at 431.

331. *Id.*

332. *Id.* at 430.

333. 8 U.S.C. § 1153(a)(2)(B) (2012).

334. *Matter of Aldecoaotalora*, 18 I. & N. Dec. at 431.

335. *Id.* at 432; see also *In re Tania Miroslava Gonzales*, No. A99-243-376, 2007 WL 4182294, at \*1 (B.I.A. 2007) (denying petition on the basis that "petitioner's daughter's divorce from her husband was a sham for the sole purpose of obtaining immigration benefits as an unmarried daughter of a United States citizen").

separation its ruling imposed. In an ironic twist, evidence of the continued vitality of her marital relationship defeated the petition, which would have led to her reunification with her legal permanent resident mother and American children.<sup>336</sup>

The above scenarios identify where immigration law does not recognize a marital union in granting status. In some instances, the marital relationship itself defeats status, such that an immigrant may decide not to marry, or to enter into a “sham” divorce. Instead of acknowledging the relationship that the system otherwise promotes, these rules disfavor marriage as a means of granting legal status.<sup>337</sup> This lack of recognition impacts the marital relationship, either by preventing it from taking place in the United States or by preventing it entirely. Importantly, the immigration provisions impact not only the immigrant who seeks status, but also the very shape that the American family can take.

## V. IMPLICATIONS FOR THE FAMILIES OF IMMIGRATION LAW

Families are not always, or only, unified entities; immigration law does not always, or only, recognize a unified family in granting immigration status. Exposing the more complicated picture of how immigration law interacts with the families it regulates is useful insofar as it raises questions about how Congress relies on family relationships in setting out immigration law and policy. As a practical matter, focusing on the families that gain admission helps formulate questions to ask of the statutory scheme; of the administration of that scheme; and of the interpretation of that scheme. As a conceptual matter, it reveals the limits of the immigration rules—both where they frustrate the goals of the family that wants to separate, and where they frustrate the family’s desire to remain intact. It also exposes immigration law’s rather expansive understanding of family relationships, which includes divorced couples, separated couples, and non-marital couples; indeed, it shows that it is most sweeping in its recognition of unity in situations involving domestic violence.<sup>338</sup>

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336. While immigration law has articulated a basis for why a marital relationship must be a “real” relationship in addition to a legal one, there is little discussion of the reverse – why a legal divorce must also be a “real” divorce. In *Matter of Aldecoaotalora*, accepting the divorce, even if a “sham,” would have still furthered the purpose of uniting unmarried children and their parents. The BIA notes that the daughter did not “return[] to the family unit of her parents,” 18 I. & N. Dec. at 431, although it is not clear how she would have been able to, where she was living, or whether living with one’s parents is a requirement imposed on children who are determined to be unmarried in granting the petition.

337. A more radical reading of these immigration rules could understand them to place the thumb on the scales in favor of non-marriage. For instance, a widow waiting for her petition to be approved can in theory still live with her partner in a non-marital relationship.

338. By addressing allegations of domestic violence, the U-visa allows different family formations to provide a basis for remaining in the United States. See discussion *supra* Part III.B.2. The U-visa bestows an incomplete recognition, but can function as a starting point nevertheless. This initial recognition parallels the trajectory followed by divorce in family law, which was once

This Part begins to show how legislative, judicial, administrative, and scholarly discussions can benefit from a firmer grounding in the reality of the immigration rules that regulate American families. To be sure, this more comprehensive account of how families fare in immigration law neither necessitates, nor leads to, any particular prescription for reform. For some, the current system may be optimal—it prioritizes an intact family, with various exceptions to that rule. For others, the system may accommodate too many instances of dis-unity and should admit only intact families. Still others may argue that immigration law should be more responsive to the fact that families experience rupture and change in granting status. This Article does not attempt to present an argument on behalf of any particular perspective; the position one chooses depends on a combination of one's understandings of the goals of the system, and one's set of normative priors. Instead, bringing out the families that the immigration system accounts for helps identify a set of rules and their consequences that are not generally assessed in considering the purpose and function of the family-based provisions.

Immigration law is currently replete with justifications, sometimes conflicting, for exceptions to the goal of promoting family unity, including: deterring fraud,<sup>339</sup> aiding law enforcement,<sup>340</sup> protecting immigrants against domestic violence,<sup>341</sup> evaluating the perceived strength of family ties.<sup>342</sup> Looking beyond each individual instance—and particular explanation—to all of the ways that immigration law acknowledges a changing family presents a more encompassing image of how immigration law functions, which becomes harder to justify coherently.

As an initial matter, exposing where the rules recognize moments of dis-unity highlights potential inconsistencies in the family-based provisions. For example: one might wonder how best to make sense of the statutory presumption that terminates status automatically upon divorce, given the routine recognition by the BIA and federal courts of self-petitions submitted after a divorce. One answer could be a justification—the statute emphasizes unity, with a few

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based on particular grounds of fault to gain legal recognition, and only eventually transitioned into a no-fault formulation. Recognizing separations in abusive non-marital relationships may provide a foundation for recognizing separations absent fault-based reasons.

339. See discussion *supra* Part III.A.1 (addressing IMFA justifications on the basis of fraud). Fraud is a particularly pressing concern of the immigration system, as discussions of the IMFA have shown. See Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 634 (2014) (noting that one of the main differences between state family law and federal immigration law “is the ferreting out and prevention of fraud”).

340. See discussion *supra* Part III.B (addressing U-visa justifications).

341. See discussion *supra* Part III.A.2 (addressing the VAWA provisions' concerns with domestic violence).

342. As in the case of the immigration provisions allowing LPRs to only petition for their unmarried, rather than married, children. See discussion *supra* Part IV.B (discussing those provisions).

exceptions that are worked out at the administrative level; moreover, the presumption provides a useful proxy for ferreting out fraudulent marriages. Another answer could be a critique—considering the widespread acknowledgment by administrators and judges of divorce, the mere fact of a legal separation should not place the validity of the entire marriage into question. Instead, Congress should remove the presumption to bring the statute into alignment with the conclusions that administrative and judicial decision-makers have basically reached: namely, that married couples, including those composed of a foreigner and an American, divorce.<sup>343</sup> Yet another approach may be to argue that if family reunification is the principal goal of the immigration provisions, the statute should bar any acknowledgment of divorce. Regardless of the outcome, each proposal would involve an in-depth conversation about how the system actually functions, and towards what ends.

Addressing divorce, death and separation further serves to question the INA's uneven acknowledgment of the different types of rupture. For example, the INA provides a waiver for divorce, but no analogous administrative procedure for married couples that separate.<sup>344</sup> The grounds that counsel in favor of providing a self-petition in the case of a divorce, however, seem to apply with equal force to a marital couple experiencing a complicated separation. To be sure, if the immigration regime is concerned with promoting an immigrant's self-determination, introducing a self-petition in the event of a separation would allow the immigrant to make a choice about the marriage independent of immigration status; if the immigration system is instead concerned with promoting marriage, the self-petition would allow the immigrant the flexibility of remaining within the relationship rather than potentially erring on the side of divorce given its administrative convenience.<sup>345</sup> Forcing the system to articulate reasons why divorce is different than separation, or what purpose it seeks to promote by recognizing either decision, would bring a degree of conceptual clarity, currently missing, to the discussions surrounding family-based immigration.

Outside of any possible legislative amendment, identifying the families that immigration law regulates provides the BIA and federal courts with a richer set of tools to analyze the family-based provisions. While some decision-makers engage with the realities of the families before them,<sup>346</sup> agencies and courts tend

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343. Concerns over fraud would no longer be triggered by divorce itself, but only upon the introduction of proof by the government that a marriage was not viable. This may result in increased costs for the government to seek out proof of fraud; but it would also reduce costs in that each divorce would not necessitate a searching administrative procedure.

344. Only a finalized divorce, not a separation, provides a basis for filing a self-petition. *See* discussion *supra* Part IV.A.

345. *See* discussion *supra* Part IV.B.

346. Courts and the BIA judges do at times engage with the realities of families. *See* discussion *supra* Part III.A.

to remain within a narrowly defined family unity rubric.<sup>347</sup> As evidenced in *Matter of Aldecoaotalora*, or *Robinson v. Napolitano*, they rely on a thin understanding of whether family unity is promoted or prevented. In the process, the families that immigration law itself accommodates in determining status are ignored.

Considering dis-unity thus reveals the weak analytic work that “family unity” accomplishes in interpreting and understanding the family-based provisions of immigration law. Looking to the actual families admitted would open judicial and administrative opinions to the various family formations that Congress acknowledges in determining entry into the United States; accordingly, rather than rely on a one-dimensional family, the BIA and federal courts can confront more fully the competing or conflicting families that appear in fact before them.<sup>348</sup>

Exposing the different types of separation that immigration law acknowledges also reveals, as we have seen, instances where immigration law burdens unity—in the form of marriage. That is, openly recognizing moments of dis-unity has revealed where immigration rules that otherwise prioritize marriage inhibit it, including the decision to remarry.<sup>349</sup> Bringing this reality to the fore helps ask why this is the case and what purpose it may serve, given the broader context of the rules. For instance, even if Congress were to affirm the necessity of placing a higher standard of proof on immigrants entering into a relationship that would bestow status for the *first* time, as in the case of marriage during deportation or with a fiancé visa,<sup>350</sup> it is not obvious why immigration law would not recognize a marriage, or a remarriage, where status is sought on a basis other than the relationship. That is, why does the remarriage of a VAWA self-petitioner prior to filing this petition terminate that petition? VAWA has exhibited a clear concern with ensuring the victim’s safety and separating the victim’s status from that of the abuser, which would not be defeated by the event of remarriage.<sup>351</sup> Relatedly, if unity is indeed a priority, then why is a widow’s remarriage prohibited while the widows self-petition is pending? In the context of the widow provision, the decision to not recognize remarriage may help define the strength immigration law imputes onto the relationship between the

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347. See *Matter of Aldecoaotalora*, 18 I. & N. Dec. 430, 430 (B.I.A. 1983); *Robinson v. Napolitano*, 554 F.3d 358, 364 (3d Cir. 2009).

348 This point is primarily a procedural one—the outcome reached may be the same, but the reasoning employed would differ.

349. See discussion *supra* Part IV.B.

350. The burden of proof for marriages entered into during deportation proceedings that would bestow status on the immigrant must be proven valid by clear and convincing evidence. See, e.g., *Malilia v. Holder*, 632 F.3d 598, 605 (9th Cir. 2011) (quoting *Velarde-Pacheco*, 23 I. & N. Dec. 253, 257 (B.I.A. 2002)) (“Given this legislative history, it appears that Congress’s intent in amending the marriage fraud provisions was to provide aliens who marry during removal proceeds ‘one opportunity to present clear and convincing evidence that their marriage is bona fide.’”).

351. See *supra* notes 216–28 and accompanying text.

widow and the deceased spouse. It may also clarify immigration law's hierarchy of family relationships. Posing the questions raised by the more complicated account of immigration law at least spurs a more searching discussion, and may push immigration law to adopt a nuanced view of death in the family, or make a determination about which relationships it finds most important in bestowing status.

Turning to dis-unity actually provides a way for immigration law to become more solicitous of marriage; immigration law's robust acceptance of dis-unity could actually lead it to recognize marriage in an additional set of circumstances. The INA currently denies status where a K-1 visa petitioner separates from the original sponsor and marries another American citizen. But if non-fraudulent marriages are indeed prioritized, the process could mimic what takes place in the event of a divorce—accepting that couples experience break-ups, the relevant inquiry would be whether the intent to marry was bona fide. And, if Congress's expectation is that fraud is higher in the fiancé visa context, then the burden of proof could be heightened to account for this increased risk. Such a rule would recall the pre-IMFA “honest change of mind” doctrine.<sup>352</sup> Like this past practice, immigration law's acknowledgment of the initial separation between the immigrant fiancé and his or her initial sponsor would lead to the recognition of the marriage to a U.S. citizen other than the original petitioner.

Finally, considering the ways that adults experience rupture results in a fuller account of the contemporary families that immigration law currently acknowledges. By allowing for moments of dis-unity, immigration law gestures towards relationships beyond merely marital unions: the U-visa, in recognizing the deleterious effects of domestic violence, acknowledges the domestic context in which the violence takes place.<sup>353</sup> This domestic context includes non-marital relationships, both homosexual and heterosexual. Similar to the trajectory taken by family law, where the separation of a cohabiting couple led to the legal recognition of cohabiting couples,<sup>354</sup> dis-unity within immigration law may pave the way to explicitly acknowledging the relationship between cohabiting couples as a potential basis for entry into the United States.<sup>355</sup> Significantly, assessing the validity of cohabiting relationships is not unprecedented in immigration law—administrators routinely engage in such determinations in deciding to issue B-2 temporary visas, where the holders can, and do, sponsor their cohabiting partners.<sup>356</sup>

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352. *Matter of Zampetis*, 14 I. & N. Dec. at 125.

353. See discussion *supra* Part IV.B. The central justification offered for the existence of the U-visa—helping law enforcement combat crime regardless of immigration status—can be understood in conjunction with a more expansive view of the family.

354. See discussion *supra* Part II.C.

355. This inquiry is a familiar one in immigration law, given that visas are currently granted to cohabiting couples outside of the family-based categories. See sources cited *supra* note 206.

356. See sources cited *supra* note 206.

But whether immigration law will, or should, explicitly acknowledge unions beyond marriage, depends on why it relies on families as a means of admission in the first instance. This fundamental set of questions about the structure and aim of the immigration system dictates the choice between competing answers and rationales. That is, if unifying intact families is not, as we have seen, sufficient on its own to explain immigration law's family-based provisions, then what is a better, and more exhaustive, explanation?

Congress has wide leeway in determining which family relationships to prioritize in setting forth rules that establish entry and admission into the United States. Congress can, for instance, decide that the bond between an unmarried child and parent is stronger than between a married child and parent and reflect that conclusion in the rules it promulgates.<sup>357</sup> It can also decide to recognize a more limited set of family relationships within a particular preference category. But why would it choose one particular scheme over the other?

Scholars have begun the project of better understanding the role that family-based immigration occupies in the system and have proposed various justifications for its existence including: facilitating integration; ensuring that the immigrant does not become a public charge; reflecting a belief that as Americans we value nuclear families.<sup>358</sup> But these discussions have not accounted for the presence of moments of dis-unity within families or within the immigration system. That is, how does integration provide a coherent rationale if we allow for divorce by choice in granting status? Or how does a preference for nuclear families provide an explanation, where marriage is burdened in numerous ways by the system? And how does a concern over fraud explain the streamlined and rather routine self-petitioning process that exists for divorce, but not for non-legal separations?

These are just some of the questions that considering dis-unity prompts. The answers to why we rely on the families we actually rely on in determining admission—be it to facilitate integration, to promote prosperity, or to express a preference for nuclear families—is important to establish; for, why we admit the types of families we decide to admit determines whether other family formations, and even formations outside of families, can equally serve the goals of the system.

## VI. CONCLUSION: IMMIGRATION LAW'S AMERICAN FAMILIES

The unification of the family depends on how the family is initially defined. Yet that definition is constantly being tested and contested. The rise in divorce

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357. See discussion *supra* Part IV.B.

358. See Abrams, *supra* note 1; Cox, *supra* note 28.



rates, single parenthood, domestic partnerships, civil unions; the recognition of same-sex marriage; the pervasiveness of cohabitation as a form of partnership—all are integral to understanding the contemporary American family.<sup>359</sup> This Article has not attempted to provide a comprehensive definition of what the family is, or should be. Instead, it has sought to expose the various combinations of dis-unity and unity that exist within the bounds of a single family unit.

While immigration law has a rather robust recognition of the ways that families change embedded in its rules, little systemic, or systematic, attention has been paid by legal actors and scholars to this more flexible structure. Such attention is necessary in order to understand which families the immigration rules recognize in granting status, and why. Congress has an opportunity to re-engage with the family-based categories set by the Hart-Celler Act in the immigration bill currently before it.<sup>360</sup> Including moments of rupture within these discussions would help to question the broad categories of “family” and “citizenship,” which are often understood as immutable and unchanging. These categories have, however, borders that are defined by the very act of exit and entry; as such, families, immigrants, and citizens exhibit an underappreciated fluidity.

In regulating the borders of the United States, Congress is clearly engaged in regulating the borders of American families—families that include U.S. citizens or legal permanent residents and those who may be on the path to gaining such status.<sup>361</sup> It is therefore essential to reach a more complete account of these

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359. See discussion *supra* Part IV.B.

360. The Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. (2013). Current amendments introduced to cut back the family-based categories are not the types of dis-unity addressed in this Article, as they simply eliminate categories that form a part of the family. See S. REP. NO. 113-40, at 100 (2013) (eliminating the category for siblings of U.S. citizens and limiting the age of married children of U.S. citizens to under thirty-one years).

361. Some conservative groups have been re-enforcing the distinction between American and immigrant families by advocating for a return to “traditional” family values espoused by immigrant families. Expressing support for immigration, Jeb Bush recently deployed visions of an immigrant family whose members “love families,” are “more fertile,” and “have more intact families.” Maya K. Francis, *Jeb Bush and the Fear of “Fertile” Immigrations*, PHILA. MAGAZINE (June 17, 2013), [http://blogs.phillymag.com/the\\_philly\\_post/2013/06/17/jeb-bush-conservative-immigration-reform/](http://blogs.phillymag.com/the_philly_post/2013/06/17/jeb-bush-conservative-immigration-reform/). While these quotes serve to re-affirm the distinction between “Americans” and “immigrants”, there is a larger movement that relies on presenting a “traditional” immigrant family to garner support for immigration reform. This narrative of “tradition” is routinely employed by outsider groups attempting to gain admission into a “majority” group, as evidenced by the DREAMer movement, or same-sex marriage advocates. See Elizabeth Keyes, *Beyond Saint and Sinners: Discretion and the Need for New Narratives in the Immigration System*, 26 GEO. IMMIGR. L.J. 207, 226–34 (2012) (outlining stories of the “good” and “bad” immigrant and arguing for a more authentic way of telling an immigrant’s story in seeking discretionary relief); see also Huntington, *Staging the Family*, *supra* note 60, at 628 (addressing ways that same-sex couples perform traditional familial roles, cautiously suggesting that “increased visibility of same-sex couples playing familiar roles, is leading to increased acceptance”).

families in order to understand how they, in turn, determine the status of the individuals who compose them.<sup>362</sup>

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362. Reaching a more complete account is also important in order to locate the limits of Congressional action in this particular arena. See Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1632 (2007) (noting the restrictions on federal regulation in matters typically reserved to state control, such as family law).